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Prosecution of Politicide in Ethiopia

The Red Terror Trials

Marshet Tadesse Tessema



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Marshet Tadesse Tessema

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Acronyms and Abbreviations

AESM	All-Ethiopian Socialist Movement
Am. J. Int'l L	American Journal of International Law
AU	African Union
B.U. INT'L L.J	Boston University International Law Journal
BYBIL	British Year Book of International Law
CELU	Confederation of Ethiopian Labor Unions
<i>Cf.</i>	Compare (<i>confer</i>)
ECHR	European Convention on Human Rights
ECOWAS	The Economic Community of Western African States
ECtHR	European Court of Human Rights
ed(s).	Editor(s)
edn.	Edition
EJIL	European Journal of International Law
EPRDF	Ethiopian People's Revolutionary Democratic Front
EPRP	Ethiopian People's Revolutionary Party
<i>et seq</i>	the following (<i>et sequens</i> ; <i>et sequentes</i>)
FDRE	Federal Democratic Republic of Ethiopia
FHC	Federal High Court
FSC	Federal Supreme Court
HILJ	Harvard International Law Journal
i.e.	That is (<i>id est</i>)
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILR	International Law Reports
IMT	International Military Tribunal at Nuremberg
<i>Infra</i>	Below
JICJ	Journal of International Criminal Justice
MEISON	<i>Mela Ethiopia Socialist Niginaqē</i>

p., pp.	Page, pages
PDRE	People's Democratic Revolutionary Party
PDRE	Popular Democratic Republic of Ethiopia
PMAC	Provisional Military Administrative Council
POMOA	Provisional Office of Mass Organizational Affairs
SPP	Special Public Prosecutor
<i>Supra</i>	Above
TG	Transitional Government
UDHR	Universal Declaration of Human Rights
WPE	Workers Party of Ethiopia

Chapter 1

Prefatory Part



Abstract This chapter sets the context of the study by briefly introducing the events that led to the replacement of the aristocratic monarchy with the military junta-*Derg* and the atrocious crimes that followed. It also introduces the approach that Ethiopia charted to reckon with the crimes. Lastly, the chapter presents the objectives of the study and outlook of the book.

Keywords *Derg* • Haile Selassie • Red Terror • White Terror • Political group • Genocide • Prosecution • Trial • Conviction • Victor's justice

1.1 General Introduction: Setting the Context

Ethiopia, the second most populous African country and one that was never colonized, was ruled for over four decades, from 1930 to 1974, by one man, Haile Selassie I.¹ The 1974 Ethiopian Revolution toppled the aged, enfeebled feudal order and absolutist monarchy, replacing it with one of the most brutal despots ever witnessed in Africa. At the time, the country was in dire need of an organized political group that could assume leadership and respond to the acute political and socio-economic problems facing Ethiopia. However, the absence of any such viable group presented an ideal opportunity for the inexperienced men in uniform to seize power in 1974.² Anticlimactically, riding on the coat tails of the popular upsurge, the lower-ranking military officers climbed into the helm of power. They suspended the Constitution, dissolved the Parliament, and established a Provisional Military Administrative Council (PMAC), commonly referred to as the *Derg*.³

'*Derg*', also referred to as '*Dergue*', is a Ge'ez word for committee or council. It consisted of junior army officers drawn from different military divisions following

¹ Marcus 1994, p. 180; Claphman 1988, pp. 42 *et seq*; Tiruneh 1995, pp. 173–75.

² Haile-Mariam 1998/99, p. 675.

³ Tiruneh 1995, p. 60.

the bloodless popular revolution of 1974.⁴ Colonel Mengistu Haile-Mariam, then a major in the army, became the *Derg*'s undisputed leader after orchestrating the killings of General Aman Andom, General Teferi Benti, as well as other senior members of his government. The drive towards adopting a Marxist-Leninist state ideology augmented following the executions.⁵

After the *Derg* seized power, it began arresting ministers and other officials of the ousted regime, and on 12 September 1974, the long-reigning Emperor Haile Selassie I was arrested and put under house detention.⁶ In November 1974, Mengistu initiated action which culminated, without any semblance of a trial, in the execution of threescore officials of the imperial government of Haile Selassie I, including two ex-Premiers, namely, Aklilu Habte Wolde and Endalkachew Mekonen, high-level military personnel, air force officers, navy officials, police officers, high-ranking civilians, and soldiers who had been arrested earlier in that year.⁷ These summary executions that were dispensed with the most elementary procedural guarantees of due process were a revelation of the true nature of the *Derg*. It marked the end of the motto of the revolution, '*Ethiopia tikedem, yale minim dem*' ('Let Ethiopia progress, without any sanguinary') and was the omen for the most grisly chapter in Ethiopian history. Shortly after the summary execution of the former officials, the *Derg* apparently decimated the Patriarch of the Ethiopian Orthodox Church, and the 83-year-old, sick, and feeble Emperor Haile Selassie I.⁸

The *Derg* tried to justify the executions as a 'political measure' that had to be taken against 'enemies of the Revolution' and 'enemies of the people'.⁹ Therefore, the *Derg* organized and unleashed throughout much of the country a deliberate use of terror to sustain its rule. This resulted, among other things, in numerous summary executions, torture, and enforced disappearances.¹⁰ Thousands perished, and many more thousands suffered physical abuse in the state-sponsored violence. These executions, however, were a mere dress rehearsal for the forthcoming orgy of

⁴ Marcus 1994, p. 188; Aneme 2006, p. 65; Tiba 2007, p. 515. See also Proclamation 1 of 1974, in which the *Derg* is referred to as a Council of the Armed Forces, Police and Territorial Army.

⁵ Tiba 2007, pp. 516–17; Aneme 2006, p. 63; Marcus 1994, p. 183; Human Rights Watch 1994, pp. 6–7. See also Trial, Mengistu Haile-Mariam available at <http://www.trial-ch.org/fr/ressources/trial-watch/triavwatch/profils/profile/262/action/show/controller/Profile.html>. Accessed 20 February 2016.

⁶ Mayfield 1995, p. 551; Aneme 2006, p. 65; Haile-Mariam 1998/99, p. 678; Tiruneh 1995, p. 205.

⁷ Tiruneh 1994, p. 207, Haile-Mariam 1998/99, p. 679. Details of the executed officials (the first victims of the *Derg* atrocities) are available at the Victims of Red-Terror Memorial Website, http://www.ethiopians.com/qey_shibir.htm. Accessed 20 February 2016. According to many of the available accounts, Aman, the first titular head of the *Derg*, was killed in a shootout while resisting arrest.

⁸ Tiba 2007, p. 516. See also BBC News 1999.

⁹ Tiruneh 1995, p. 212. Mengistu's regime shamelessly referred to the summary execution of the sixty officials as 'justice', see New York Times 1974.

¹⁰ Tiruneh 1995, p. 218.

violence, which was officially launched by the Mengistu regime and called the ‘Red Terror’.

The Red Terror in Ethiopia was not an accident or an isolated oddity; rather it was a well-coordinated and systematized massacre directed against the perceived and real opponents of the military regime, most of whom were members or sympathizers of the Ethiopian People’s Revolutionary Party (EPRP) and the All Ethiopian Socialist Movement known by its Amharic acronym as ‘MEISON’, which in Amharic means ‘*Mela Ethiopia Soshalist Niqinaqē*.’¹¹ Mengistu labelled the EPRP’s sporadic campaign of assassination of *Derg* members as ‘White Terror’ and began responding with his violent cataclysmic campaign of assassinations called the Red Terror.¹²

The Red Terror is a term borrowed from the Russian Revolutionary lexicon which means the decimation of ‘counter-revolutionaries’, ‘reactionaries’, or political opponents.¹³ The terror in Ethiopia was no different. Simply put, the Red Terror in Ethiopia consisted of violent state-sponsored acts of mass executions, torture, arbitrary arrests, enforced disappearances, and acts of terror by the Stalinist regime of Mengistu.¹⁴ Mengistu officially launched his violent political campaign and killing spree by publicly declaring ‘death to counter-revolutionaries’ and ‘death to the EPRP’ in 1977.¹⁵ The ‘revolutionary Ethiopia’ or ‘revolutionary measure’ was the choice that was officially offered by Mengistu to the Ethiopians. The killing sprees, acts of torture and other atrocities perpetrated by the *Derg* officials in Ethiopia were not a result of ethnic chauvinism, as in Rwanda and South Africa. Instead, the atrocities were measures aimed at eliminating the proliferation of radical civilian and armed opponents. It was a politically motivated, indiscriminate killing of opponents. In other words, what happened during the post-1974 upheavals in Ethiopia was a political massacre or ‘politicide’ which means the annihilation of political groups.¹⁶

During this period of massive human rights violations, thousands of young people were shot to death on sight in Addis Ababa and other towns.¹⁷ Bodies littered the streets of Addis Ababa, with Marxist slogans pinned to them.¹⁸ In the period of the official Red Terror, which lasted for about two years, and starting with the (real or perceived) EPRP members, tens of thousands of people were arrested, tortured, and murdered en masse, with their bodies sometimes left in the street as a warning to others. Amnesty International reported that the total number of persons

¹¹ Aneme 2006, p. 66; Tiba 2007, p. 516; Tiruneh 1995 p. 220.

¹² Tiba 2007, p. 516; Aneme 2006, pp. 65–66.

¹³ Haile-Mariam 1998/99, p. 676; Aneme 2006, p. 66. See also Toggia 2012, pp. 265–280.

¹⁴ Aneme 2006, p. 66.

¹⁵ Tiba 2007, p. 516; Human Rights Watch 1994, p. 7.

¹⁶ For a definition of politicide, infra Sect. 3.3.1.

¹⁷ Human Rights Watch 1994, pp. 8–10; Tiruneh 1995, pp. 212–220.

¹⁸ Aneme 2006, pp. 66–67.

killed during the Red Terror campaign alone was between 150,000 and 200,000.¹⁹ Poignantly, the families of the victims who were lucky enough to obtain the corpses of the murdered family members were required to pay for the bullets ‘wasted’ to kill the victims before they could claim back the corpses.²⁰ Although the official campaign of the Red Terror culminated in late 1979, the brutalities by the Mengistu regime continued until late in 1989. Up to the time that he fled to Zimbabwe, Mengistu had held the country in an iron grip and the law of the jungle prevailed.

In general, the 17 years of brutalities perpetrated by the *Derg* regime were characterized by serious state-sponsored human rights violations in the form of executions, political killings, torture, arbitrary arrests, enforced disappearances, unlawful dispossession of property, and forced resettlement. The regime of Mengistu, the ‘butcher of Addis’, as some referred to him, drenched the country in a bloodbath for an entire 17 years.

On 8 May 1991, the Ethiopian People’s Revolutionary Democratic Front (EPRDF)—a coalition of ethnic-based rebels dominated by the Tigray People’s Liberation Front (TPLF), which still rules Ethiopia today—captured Addis Ababa, ending the 17 years of terror and civil war. Mengistu fled to Zimbabwe where he is sheltered today. Some 1,980 *Derg* officials, including the former Prime Minister, Foreign Affairs Minister, members of the security forces, commanders, and other higher *Derg* officials and associates, were arrested when the EPRDF assumed control over the country.²¹ The arrest of suspected officials continued thereafter. The suspects remained behind bars for up to three years in most cases without being formally charged. These incarcerations elicited trenchant criticisms, which centered on the violation of the fair trial rights of the suspects.

Following a peace conference convened by the EPRDF, a Transitional Government composed of representatives from several political parties and political ethnic organizations was established.²² On 22 July 1991, the Transitional Government promulgated the Transitional Charter that affirmed several fundamental rights,²³ the FDRE Constitution replaced it in 1995.²⁴ However, it was not enough that the *Derg* regime had fallen and been replaced by the EPRDF, for the fall of the brutal Mengistu regime and the end of the bitter civil war had left people with a ruined economy, looted public coffers, and torture chambers full of political prisoners. The Mengistu regime had devastated the country. Tens of thousands of people had been executed, tortured, and arbitrarily arrested, or had disappeared or been forced into exile.

¹⁹ Aneme 2006, p. 66.

²⁰ Aneme 2006, p. 66.

²¹ SPP Report 1994, p. 3; Tiruneh 1995, p. 371.

²² Tiruneh 1995, pp. 371–72; Aneme 2006, p. 67.

²³ Transitional Period Charter of Ethiopia 1991. See also Vestal 1994, pp. 188–204.

²⁴ The FDRE Constitution 1995. For the discussion on the processes of the adoption of the Constitution, see Vestal 1996, pp. 21–38; Young 1998, pp. 191–204; Paul 2000, pp. 173–190.

The fear was what would happen to Ethiopia after the mud walls of dictatorship came tumbling down. Would Ethiopia be like Humpty Dumpty who had a great fall and could not be put together again, or would the country emerge from its horrific past by rescinding ‘rules of the jungle’ and addressing its troubled recent past? The citizenry expected the Transitional Government to address these issues and to put respect for human rights at the top of the reform agenda for the future, apart from offering respite and hope to people who had lost their loved ones and suffered so much in one way or another. Nevertheless, the question and choice of how to deal with the past horrific abuses, to create a more democratic future, was not an easy and simple policy choice, even more so, for a poor country like Ethiopia. It was a herculean but necessary task.

When a society is trying to move away from a bitter civil war or from an autocratic regime towards democracy, the question of how to deal with the ‘darkest past’ in which massive and systematic violations of rights were rampant, necessarily generates debate and raises challenges. Given the differences in the nature and extent of past heinous acts and abuses, and ‘the incompleteness and inescapable inadequacy of each possible response to collective atrocities’, there is no ‘one size fits all’ transitional justice mechanism.²⁵ However, dealing with the violent conflict, massacres, repressions and other gross human rights violations and mass atrocities of the *Derg* was indisputably necessary, not for its own sake, but in order to clear the way for a new beginning. Otherwise, unaddressed atrocities and a sense of injustice would not only haunt the nation but also remain as embers that could ignite similar conflicts in the future. Of all the transitional justice mechanisms, namely, truth commissions, lustration, amnesty, prosecution, and reparation, the EPRDF chose official accountability or prosecution as the main means of dealing with the horrendous conduct of *Derg* officials.

The alleged crimes of the fallen leaders of Ethiopia were unknown in Ethiopian history and attracted national attention. As stated by the Transitional Government, the *Derg* regime perpetrated ‘heinous and horrendous criminal acts which occupy a special chapter in the history of the people of Ethiopia.’²⁶ The Transitional Government chose to bypass the existing (dysfunctional) prosecutorial structure and established the Office of the Special Public Prosecutor (SPP) to handle exclusively gross human rights violations perpetrated under *Derg* rule from 1974 to 1991.²⁷ In addition to investigating and prosecuting the alleged crimes, the SPP was entrusted with another mandate ‘to record for posterity the brutal offences and the embezzlement of property perpetrated against the people of Ethiopia and to educate the people and make them aware of those offenses in order to prevent the recurrence of such a system of government.’²⁸ However, the latter mandate was ancillary to the former.

²⁵ Lanegran and Gaybill 2004, p. 5.

²⁶ See SPP Proclamation 1992, Preamble.

²⁷ SPP Proclamation 1992, Article 2. See also Aneme 2006, pp. 75–76; Tiba 2011, p. 168.

²⁸ SPP Proclamation 1992, Preamble.

The SPP is unique and the first of its kind in Africa and beyond, for until it was established there had not been any other experiments of a similar kind.²⁹ The SPP was entrusted with very broad and ambitious mandates. It is not clear whether these mandates were meant to give the SPP the peculiarities of a truth commission or of other truth-telling bodies. What is clear is that the second mandate was given scant attention.

The powers of the SPP were confined to the prosecution of crimes allegedly perpetrated only by *Derg* officials. This means that the investigation and prosecution of plausible crimes that were allegedly committed by other camps (e.g., the EPRP, MEISON and TPLF officials) were excluded from the ambit of the SPP's powers. Moreover, the Proclamation that established the SPP did not spell out which particular offenses the Office should prosecute, although it was quite specific about who should be investigated and prosecuted. The whole process would have been more expeditious had the lesser crimes been explicitly excluded from the ambit of the SPP's mandate.

For the Red Terror trials, meaning the prosecution of *Derg* officials who were suspected of committing the crimes of genocide, aggravated homicide, torture, arbitrary arrest and other crimes, there was no special court or chamber that was established by the Ethiopian government. They were tried before the regular High Court at the Central (Federal) level and the Regional Supreme Courts of five regions, namely, Oromia, Amhara, Tigray, Harari, and Southern Region. Thus, the Red Terror trials did not take place before one court nor in a single charge.

It took approximately two years for the SPP to start its work. After detaining the suspects for almost three years, in October 1994, the SPP filed the first 269-page long charge sheet in the then Central High Court, later renamed as the Federal High Court (FHR), against 106 high-level *Derg* officials, including former President, Colonel Mengistu Haile-Mariam and 72 other top-tier *Derg* officials. The *Special Prosecutor v Mengistu et al* is only one among many of the Red Terror cases against the former *Derg* officials.³⁰

It bears noting that in the Red Terror trials over 6,000 *Derg* officials and associates were prosecuted before the Federal High Court and the five Regional Supreme Courts.³¹ The Mengistu case, which is also referred to as the Red Terror trial (the main trial) in this study, is only one of the enormous number of Red Terror

²⁹ In Mexico, the Special Prosecution Office was established in 2002. Its structure and mandates are more or less similar to the Ethiopian SPP. For details, see Acosta and Ennelin 2006, pp. 98–110.

³⁰ Federal High Court, *Special Prosecutor v Col. Mengistu Haile-Mariam and others*, Criminal File No. 1/87. (Hereinafter the '*Mengistu et al* case or 'Red Terror trial'); and SPP, *Special Prosecutor v Mengistu et al*, Charges, Criminal File, No. 401/1993.

³¹ There are no official statistics on the actual number of cases, convictions and acquittals in the *Derg* or Red Terror trials. About 6,000 *Derg* officials were charged by the SPP. Of this number about 1,500 were charged and tried before different Regional Supreme Courts. About 2,000 *Derg* officials were charged *in absentia*. For more, see *infra* Sect. 5.2.1.

trials.³² The *Mengistu* case attracted public attention because the charge was against the policy and decision makers of the *Derg* regime. It is a case against the highest or upper echelon of the former brutal regime, like the former President, Mengistu Haile-Mariam; the Minister of Defence and Military Commander in Eritrea, Tesfaye Gebre Kidane;³³ the Prime Minister, Fiker Selassie-Wogaderes, the Deputy Prime Minister and the Chief of Staff of the Armed Forces, Hadis Tedla; the Deputy President, Fisseha Desta, the Foreign Affairs Minister, Berhanu Bayeh; Legese Asfaw (nicknamed the ‘butcher of Tigray’), Melaku Tefera (nicknamed the ‘butcher of Gonder’) and Debela Dinsa.

The 106 officials were charged mainly with inciting and committing 209 counts (or acts) of the crimes of genocide, abuse of power, and arbitrary arrest.³⁴ As an alternative to the charge of committing genocide, they were charged with aggravated homicide under the 1957 Penal Code. Of the 106 individuals indicted in the *Mengistu et al* case, 25 *Derg* officials, including Mengistu Haile-Mariam, were charged and tried *in absentia*.³⁵ The *Mengistu et al* case took almost 18 years to be wound up (from the time the defendants were detained until the decision of the Appellate Court), which is a period longer than the *Derg*’s stay in power.³⁶ It is contentious whether the caustic criticism of the protracted nature of the proceedings could be ameliorated by the circumstances surrounding the transition from *Derg* to EPRDF or any other reason.³⁷

After a protracted trial, in 2006 the Court handed down its conviction judgment. By a majority of two to one, the Court convicted Mengistu and other ‘big fish’ for the crimes of political genocide, abuse of power and unlawful detention.³⁸ Many were sentenced to life imprisonment. About 14 accused died in the course of the lengthy trial. A total of 34 defendants were present during the sentencing judgment. Corporal Begashaw Gurmesa was the only accused acquitted of all the charges in the *Mengistu et al* case.

Both parties appealed to the Federal Supreme Court. In 2008, the Federal Supreme Court upheld the conviction judgment and overturned the sentences

³² For more, see *infra* Sect. 5.2.

³³ He was an interim acting President when Mengistu mysteriously fled to Zimbabwe. He is, perhaps, the most short-lived President that Ethiopia has had (lasted only one week—from May 21 to 27, 1991).

³⁴ *The Mengistu et al* case pp. 115–120.

³⁵ *The Mengistu et al* case, pp. 1–5.

³⁶ There are various imputable reasons for the delay. These include the double mandates of the SPP, limited resources, poorly equipped justice machinery, limited international support, tendering large number of witnesses, and jointly charging several accused for many complex crimes. For further discussion, see *infra* Sect. 6.1.4.

³⁷ Aneme 2006, p. 69; Menegsha 2008/2009, pp. 57–58.

³⁸ Although the *Mengistu and others* case was the first case filed by the SPP, it was not the first case in which judgment was handed down and a sentence was meted out. The cases of Geremew Debela, Getachew Tekeba, and Zeleke Zerihun are some of the Red Terror cases in which judgments were handed down in late 1999.

imposed by the Federal High Court. It imposed the death sentence on Mengistu and 17 other senior officials of his regime.³⁹ The death sentence, however, was never carried out as the government commuted the death penalty to life imprisonment but only for those who were already in prison. In 2011, despite a public outcry against parole, many *Derg* officials were released after serving two-thirds of their respective sentences. Others were granted asylum or sheltered by various states; hence, the culprits, including Mengistu, Berhan Bayeh, and Hadis Tedla, remain ‘African Pinochets’ who are living lavish lives elsewhere with impunity despite their hideous criminal past.

Against the above-sketched backdrop, it is blatantly clear that the *Mengistu et al* case is inimitable in its nature. First, in contradistinction to the approaches chosen, for instance, in the cases of Rwanda, Sierra Leone, and Germany after WW II, Ethiopia’s Red Terror trials were launched and took place with local impetus. Put differently, they are trials of Mengistu and his senior officials in Ethiopia, by the Ethiopian courts, prosecutors, defense counsels, and pursuant to the Ethiopian Penal Code of 1957 with only little international support. Secondly, the Red Terror trials are also a departure from the non-retributive approaches chosen by South Africa and some Latin American countries in dealing with their past, in which some individuals remain untouched and implicitly allowed to get away with their criminal past. Thirdly, though unique, the Red Terror trials have been under-reported as national prosecutions of state officials for the commission of ‘international crimes’. This makes Ethiopia one of the few African countries that have been able to rightly prosecute its former state officials, including the President and Prime Minister, for genocide and other crimes, without recognizing and extending immunity to them.

Nonetheless, the Red Terror trials are not above criticism. Since not a single person who perpetrated the White Terror has been subjected to prosecution, the Red Terror trials, just like the Nuremberg trial, are considered by some commentators to be symbolic of ‘victor’s justice’. In other words, they were conducted simply to accord international legitimacy to the new regime rather than as a tool or genuine commitment to end impunity. This is called political posturing.⁴⁰ What is more, the prosecution and conviction of *Derg* officials for the crime of political genocide spawned debates on the issue of legality. Judge Nuru Said in his dissenting opinion stated that the conviction of *Derg* officials of the crime of genocide did not fulfil the definition of the crime in international law. In his view, *Derg* officials should have been convicted of aggravated homicide, as alternatively charged by the SPP, rather than of the crime of political genocide.⁴¹ The argument here is that since the *Derg* regime did not kill people on the grounds of their race, nationality, ethnicity, or religion, but on the basis of their alleged membership of the EPRP, MEISON or other political groups, the conduct of *Derg* officials is not genocide under

³⁹ Federal Supreme Court, *Special Prosecutor v Colonel Mengistu Haile-Mariam & others*, Appellate Judgment, Criminal File 30181, 26 May 2008.

⁴⁰ Hailegebriel 2003, pp. 14–19; Aneme 2006; Menegesha 2008/2009, p. 57.

⁴¹ The *Mengistu et al* case, p. 300.

customary international law. In other words, it has been repeatedly stated that convicting *Derg* officials of genocide contravenes the established *jus cogens*.⁴² Thus, the Red Terror trials are not about international crime because the conduct does not amount to a core crime under international criminal law—genocide *per se*. As will be shown in Chap. 6 of this book, the argument that the Red Terror trials were not about international crimes does not hold water because the individual acts for which *Derg* officials were found guilty are classical instances of crimes against humanity. However, owing to lack of a law criminalizing crimes against humanity as such in Ethiopia, they were not charged with crimes against humanity as such. In addition, politicide was criminalized as part of genocide under the Penal Code of Ethiopia.

The Red Terror trials have also been attacked from the vantage point of the accused's fair trial rights, as the duration of the trials were protracted and in some cases longer than the tenure of the Mengistu regime.⁴³ Furthermore, the fact that several defendants, including Mengistu, were tried and convicted in absentia for the crime of genocide, has raised the question of the legitimacy of the trials.

Another criticism of the Red Terror trials is the incompleteness of the approach chosen by Ethiopia in dealing with massive human rights violations. Although Ethiopia chose and engaged in massive prosecutions of *Derg* officials, other complementary transitional justice mechanisms were not used as widely and as effectively to make the transition a full-fledged one. In addition, the issue related to the enforcement of the sentences of Mengistu and two other convicted criminals who at the time of writing have been sheltered, respectively, in Zimbabwe and the Italian Embassy in Ethiopia, for over the last 25 years since 1991 is far from clear. This merits an in-depth analysis.

Although Mengistu was convicted *in absentia* of genocide and other crimes, he has been holed up in Zimbabwe. It is true that unlike other African dictators, like Idi Amin of Uganda and Beni Ali of Tunisia, who packed up and flew off like bats out of hell to the dictators' 'safe haven' Saudi Arabia, where they were received with open arms instead of being prosecuted, Mengistu has at least been convicted in his home country of genocide and other crimes. However, he has found refuge in Mugabe's Zimbabwe, like Mohamed Bare of Somalia who lived out his last days in Nigeria and Zaire's Mobutu Sese Seko who died in Morocco. Even if the Ethiopian government has not made any discernible effort to secure the extradition of the convicted persons, both Zimbabwe and Italy have turned down extradition/surrender requests. Given the egregious nature of the crimes perpetrated by these individuals, the well-propounded *jus cogens* notion—*aut dedere aut judicare*—should have been put into effect to satisfy the victims' quest for justice. In this regard, too, at the time of writing, the Ethiopian government has not undertaken significant action to pressurize the two countries to prosecute or extradite the

⁴² Hailegebriel 2003, p. 15. Cf. Tiba 2007, p. 513.

⁴³ Menegsha 2008/2009, pp. 25–30; Aneme 2006, pp. 75–82.

individuals, as Belgium did before the International Court of Justice (ICJ) against Senegal in the case of the former Chad President, Hissène Habré.⁴⁴

In general, even if the Red Terror trials are landmark cases regarding the national prosecution of crimes under international law, which is undeniably significant or, at least emblematic, they are as yet under-reported, under-studied and relatively unknown. Apart from this, the issues mooted above, and the perplexities surrounding Red Terror trials need to be addressed and clarified. This is the basic motivation for this study on the Red Terror trials. The idea is to undertake a critical analysis of the shadows and lacunae and to evaluate the general aspects of these unique atrocity trials as well as their pivotal contributions to the area of international criminal justice.

1.2 Objectives of the Book

This study aims to undertake a critical perusal of the prosecution of international crimes in Ethiopia—the Red Terror trials.

More concretely, the study aims to:

- Explore and evaluate the approach(es) chosen by Ethiopia to deal with the horrendous Red Terror acts of the *Derg*;
- Evaluate the legal basis for the prosecution of genocide in the Red Terror trials;
- Address the genocide or not debate; and
- Assess the retributive justice approach chosen by Ethiopia from the vantage point of the victims' quest for justice, and of coming to terms with the gruesome Red Terror and other past injustices.

1.3 Outline of the Book

The book is organized into seven chapters. This introduction which comprises a general introduction and the objectives of the study forms chapter one of the book.

Chapter 2 is devoted to a description and analysis of the genesis of the Red Terror and White Terror. It dwells on, *inter alia*, the end of the feudal regime and the coming into power of the military *junta*. It deals, too, with Mengistu's

⁴⁴ International Court of Justice, *Belgium v Senegal*, Questions relating to the Obligation to Prosecute or Extradite (2012) § 39 available at: <http://www.icj-cij.org/docket/files/144/17064.pdf>. Accessed 20 February 2016.

consolidation of power and the military junta's reaction to the scathing criticism and demands of radical intelligentsia for the establishment of a popular government.

Chapter 3 discusses the legal framework for the prosecution of core crimes under Ethiopia's Penal Code of 1957. This Chapter explains the structure of core crimes under the Penal Law of Ethiopia. In addition, a special focus is placed on the crime of genocide, of which the *Derg* officials were convicted. This Chapter also makes a cursory analysis of modes of liability for crimes under international law in the Penal Code.

Chapter 4 is devoted to the establishment of the SPP, its mandate, period of operation and other related issues pertaining to its work. It also deals in general with mechanisms available to and at the disposal of transitional governments to confront crimes of a defunct dictatorial regime like that of *Derg*.

Chapter 5 deals with the gist of this thesis, namely the prosecution of *Derg* officials for the crime of genocide. In doing so, the chapter discusses the charges, the verdicts, and sentence handed down by the courts. The discussion of the trials covers the preliminary objections, the High Court's ruling on the objections, the arguments of the state and defense counsels. In addition, the reasoning of the majority judges for the conviction of the *Derg* officials is juxtaposed against the argument of dissenting judge, Nuru Said. Finally, the decision of the Appellate Court, which varied the sentencing judgment of the Federal High Court, is analyzed. The commuting of the death sentences and subsequent release of the convict persons is addressed before winding up the discussion.

Chapter 6 evaluates the Red Terror trials. This chapter addresses the shortcomings of the trials from the vantage points of, *inter alia*, the fair trial rights of the accused, victor's justice or selectivity, trial *in absentia*, capital punishment, and the enforcement of sentences. The chapter analyses the contributions of the trials to the transition from the *Derg* to the EPRDF.

Chapter 7 draws the threads together and concludes the study with recommendations.

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Chapter 2

Historical Survey of the *Derg* Regime and the Infamous Red Terror



Abstract This chapter delves into the background to the 1974 popular revolution and the replacement of the aristocratic feudal monarchy with the military dictatorship. It also highlights the first period of the *Derg* regime, the genesis of the infamous Red Terror and White Terror, how the *Derg* regime decimated its opponents, and the civil war with the ethnic-based insurgents in the northern part of Ethiopia. Lastly, the Chapter briefly chronicles the demise of the *Mengistu* regime and the coming into power of the ethnic-based insurgents.

Keywords *Derg* • Revolution • Military junta • Red Terror • White Terror • Monarchy • Mengistu • War • Famine • Ethnic-based coalition

2.1 The Prelude to the 1974 Revolution

Ethiopia is a multi-ethnic and multi-religious ancient nation. It is the second most populous African country after Nigeria. It is located in the horn of Africa, and like Liberia, is one of the only two African countries that was never colonized. Centuries ago, Ethiopia won a great emblematic victory, called *Adwa*, over the Italian forces. In other words, Ethiopia has escaped the European powers scramble for Africa by defending itself successfully. Since then, *Adwa*, akin to the gallant Zulu resistance by Shaka to the British or the Mau Mau resistance in Kenya, stands as one most prominent redeeming moment that reverberates in the hearts of many Africans.¹

¹ For more details, see Pankhurst 2002; Farkas 2003, p. 47; Zewde 2002; Marcus 1995; Milkias 2005; Tibebe 1995; Jonas 2011; McLachlan 2011.

Despite such a proud history against the colonial power, Ethiopians have for a long time lived under the yoke of an aristocratic monarchy and under different kinds of dictatorships. Ethiopians were not united enough to solve their indigenous crisis and problems. Hence, they have not been led by a democratically elected leader of their own free and true choice.

The diversified Ethiopian nation was led by an aristocratic feudal monarchy for about 3,000 years, which claimed and traced its pedigree to King Solomon.² On 22 September 1928, Empress Zewditu elevated Tefari Mekonnen to a *negus* or kingship apparatus.³ Shortly thereafter, following the prodigal coronation ceremony, Tefari was crowned as *negus negast* (king of kings) on 2 November 1930. By taking his baptismal name, he became Haile Selassie I (meaning power of the Holy Trinity), the Conquering Lion of the Tribe of Judah, Elect of God, Emperor of Ethiopia. The Emperor was much revered for his key active role in the League of Nations, and later in the United Nations. Domestically, the Emperor also won recognition for some of the reforms he introduced, *inter alia*, the promulgation of the first written Japanese-style constitution in the history of Ethiopia, the creation of parliament and the massive codification of other laws, including the 1957 Penal Code, based on which the *Derg* officials were later prosecuted. The Emperor, however, exercised absolute powers throughout his tenure.⁴

However, over time, and on account of his neglecting the problems and needs of the populace, and his disregard of the national economy, Haile Selassie increasingly lost the respect of the nation. The feudal system he had established was based on patronage, according to which he created prerogatives for small groups of land-holding aristocratic elites who controlled the country's economy, whilst the vast majority of the landless peasantry were left in abject poverty.⁵ This problem and the economic crisis, which was caused by both exogenous and endogenous factors, widened the chasm between the much-revered Emperor and opposition groups.

The mutiny of the soldiers of the small garrison in Negele, Southern Sidamo, in 1974, showed the powerlessness of the Emperor's regime.⁶ The reason for the mutiny was mainly economic. The mutineers demanded better-living conditions and a pay increase. The Emperor dispatched officers to quell the mutiny. However, the arrest of one of the dispatched senior officers showed the powerlessness of the

² Zewde 2002, pp. 235 *et seq.* As envisioned in the *Keber Negest* (Glory of the Kings), King Solomon seduced Queen of Sheba at the time she paid a visit. Later she gave birth to Menelik I. Since then the so-called Solomonic Dynasty emerged and developed. To be an emperor, descending from this lineage was one of the requirements; and the dynasty ruled till the fall of the last Emperor, Haile Selassie, in 1974. For more discussion on Haile Selassie regime, see Pankhurst 2002; Marcus 1994; Tibebu 1995; Adejumobi 2007; Clapham 1988; Henze 1984, pp. 98–124.

³ Marcus 1994, p. 125; Zewde 2002, p. 140.

⁴ See generally, Jembare 2000.

⁵ Tarek 1991; Legum 1975; Marcus 1994; Markakis 1987; Zewde 2002; Clapham 1988; Tiruneh 1995.

⁶ Zewde 2002; Tarek 1991; Tibebu 1995; Schwab 1985; Tiruneh 1995; Marcus 1994.

imperial government, signifying that it was heading towards disintegration. After this episode, protests against the Haile Selassie regime started to intensify.

The grievances and discontent led to the rise of opposition and increased protests throughout the country. Students and teachers demonstrated in protest against the educational sector review and demanded 'land for the tiller'.⁷ The protest was not limited to students, teachers, and the army. Taxi drivers, too, stopped their work and demonstrated against the government's adamant refusal to increase fares following the soaring price of fuel due to the inflated price of oil on the international market.⁸

A disastrous famine struck the northern part of the country, especially Wollo province between 1972 and 1974. The government tried its best to cover up, and denied the existence of the famine. The Haile Selassie government's concealment of the famine and its refusal to consider assistance made the famine apocalyptic, claiming the lives of over 40,000 Ethiopians.⁹ The revelation of the catastrophic famine on British television by journalist Jonathan Dimbleby shocked the international community and Ethiopians as well. Most Ethiopians were not only stunned but also enraged and aggrieved when they realised the lethal effect of the famine in the northeastern region of the country which had started a year before.

The feudal aristocratic regime, though forewarned about the famine, did not take any palpable action to curb or ameliorate the adverse effects of the catastrophic famine. Instead, it neglected it and concealed the crisis to forestall any threat to its power at any cost. Denying the existence of famine in the country, the imperial regime rejected the offers of aid by international aid agencies for the drought affected areas.¹⁰ This exacerbated the devastating effect of the 1972–1974 famine. When the truth was later revealed, wave upon wave of popular strikes and protests called for the destruction of the foundation of the aristocratic regime. The devastating effect of the famine gained political currency among different groups, which further weakened the imperial regime.¹¹

The mutinies of non-commissioned soldiers, which first started in Negele in January and then spread to other places, intensified. Initially, they demanded amelioration of their dreadful living conditions, improved working conditions, and

⁷ Marcus 1994, pp. 182–183; Tiruneh 1995, pp. 38–40.

⁸ Tiruneh 1995, pp. 40–42.

⁹ De Waal 1991, pp. 52–58. For detailed accounts on the causes and consequences of the lethal famine, see Woldemariam 1986; Schwab 1985, p. 15; Peter 2010, p. 15; Amnesty International 1991a, p. 6; Markakis 1979, p. 12. Markakis stated that 200,000 Ethiopians perished because of the famine. Cf Amnesty International 1978, p. 4. According to Schwab, the number of victims of the 1973–74 famine in the then 11 regions was as high as 300,000 out of an estimated total population of 27 million. On the historical demographical data of the country <http://www.populstat.info/>. Accessed 3 March 2016. The effects of the famine were worsened and resulted in the deaths of a significant number of Ethiopians who could have been saved had it not been for the stubborn denial of the famine by the Emperor.

¹⁰ Markakis 1979, p. 12. For details, see Marcus 1994; Tiruneh 1995; Zewde 2002; Clapham 1988; Woldegiorgis 1989; Legum 1975; Marcus 1994; Woldemariam 1986; Clapham 1969; Markakis 1974; Haile-Selassie 1997; Henze 2000; Bekele 1993.

¹¹ Markakis 1979, pp. 10–12; Marcus 1994, p. 180.

pay increases.¹² Although the government decided to raise salaries to satisfy the grievances of the mutineers, it failed to head off the crises in the different garrisons. In the meanwhile, the teeming crowds of students joined with other dissident groups to voice their discontent openly. They demanded land reform and the end of the decaying monarchy.¹³

On 27 February 1974, the cabinet of ex-Prime Minister Aklilu Habte Wolde was dismissed as a scapegoat and means to ease the insurrections. The dismissed cabinet members were placed under arrest by the military on charges of corruption.¹⁴ Nonetheless, the dismissal of the cabinet as a concession never mollified the popular movements; rather, it not only showed how the imperial regime was weakening but also how it was beginning to crumble.

The new cabinet vowed to embark on a large-scale reform programme.¹⁵ The government of Emperor Haile Selassie, led by the new cabinet of Endalkachew, was on the road to reform, but at a snail's pace. The Endalkachew cabinet established a commission to investigate the corruption charges of erstwhile ministers and other dignitaries who were under arrest. However, all these initiatives failed to subdue the discontent and save the throne of the inept Emperor and the Endalkachew cabinet. It is undeniable that the new Prime Minister, Endalkachew and his cabinet tried to restore the regime's legitimacy, but in vain. As Marcus stated,

its [Endalkachew's cabinet] energy was dissipated in coping with demonstrations by workers, students, teachers, government officials, Moslems, and Orthodox priests, each of them accompanied by pamphlets that demanded reforms. They contained few references to Marx, Lenin, or to socialism.¹⁶

The Endalkachew cabinet never addressed the land reform question, save for initiating a few trivial reforms to dampen the protest movement and to save the collapsing hegemony of the feudal monarchy that was on the verge of disintegration and battling to survive. It did not take long to prove that the dismissal of the former cabinet neither solved the problem nor stopped the insurrections.

The government only started late to respond to some of the demands. As part of its response to the famine, the Haile Selassie government allowed the relief organizations to enter the country to give the much-needed assistance to famine devastated areas.¹⁷ It also increased the salaries of the soldiers and, to some extent, improved their living conditions. However, this did not satisfy the aggrieved dissidents; rather, it fueled a series of parallel mutinies and waves of strikes against the feeble feudal monarch. As Marcus noted: 'The attendant crisis of 1973–1974 revealed that the emperor's government was neither humane nor competent enough

¹² Marcus 1994, p. 183; Tiruneh 1995, pp. 63–68; Schwab 1985, pp. 18–25.

¹³ Marcus 1994, p. 183; Tiruneh 1995.

¹⁴ Marcus 1994, p. 183.

¹⁵ Schwab 1985, p. 17; Tiruneh 1995; Marcus 1994, pp. 185–186.

¹⁶ Marcus 1994, p. 185.

¹⁷ Schwab 1985, pp. 15–17.

to meet the obvious needs of millions of its impoverished subjects.¹⁸ In the result, the Emperor was not only very reluctant to respond to the demands of the masses, but also inept in doing so timeously and adequately. He foolishly considered it a routine thing that he could easily manage. But, not this time. His myopia and reluctance to name an adept successor and a proper institution to handle the crisis cost him dearly.¹⁹ It cost him not only his throne but also his life.

As stated above, at the outset the mutineers from the military were non-commissioned and apolitical entities that united for economic reasons. Later on, the mutineers started to politicize themselves. In late June, the officers sent a message to different divisions, asking them to send delegates holding the rank of major or below to the Fourth Division's headquarters in Addis Ababa.²⁰ On 28 June 1974, the *Derg* was officially established as a representative of the armed forces to organize and mobilize the military for reform. *Derg* is a Ge'ez²¹ word for council or committee given as a name by Nadew Zekarias to Coordinating Committee consisting of about 180 men, from the army, police, and territorial forces.²² Because of the opaque nature of the *Derg*, there is no unanimity on the exact number of the founding members of the Committee—different individuals provided different figures on the original members of *Derg*. For instance, Clapham wrote that the founding members of the *Derg* were 108, whereas Zeneb and Tesfaye stated that the *Derg* consisted of 109 and 111 officers drawn from different divisions, respectively.²³ On the other hand, Halliday and Molyneux stated that the original members of the *Derg* were 126.²⁴ Zewde stated that 'in actual fact, their number was less than 110.'²⁵ Mengistu confirmed that the number of members of the *Derg* at the outset was 120, ranging in rank from plain soldiers to majors.²⁶ As requested by the

¹⁸ Marcus 1994, p. 180.

¹⁹ Schwab 1985, pp. 16–20; Marcus 1994, pp. 179–182.

²⁰ Marcus 1994, p. 187.

²¹ Ge'ez is one of the Semitic languages spoken in Ethiopia. Now it is used only in the Ethiopian Orthodox Church services mainly by the clergy.

²² Ayele 2009a, b, p. 125; Schwab 1985, p. 17; Marcus 1994; Zewde 2009, p. 28; Tiruneh 1995; Babile 1989; Clapham 1988, p. 40; Haile-Mariam 1998/99, p. 674 at footnote 26; Markakis 1979, p. 6; Henze 1984, p. 100; Halliday and Molyneux 1982, pp. 5–6; Aneme 2006, p. 65; Amnesty International 1991b.

²³ Felek 2011, p. 13; Tesfaye 2008, p. 11; Clapham 1988, p. 40.

²⁴ Halliday and Molyneux 1982, p. 8. See also Amnesty International 1991b, p. 6.

²⁵ Zewde 2002, p. 234.

²⁶ Ayele 2000, p. 125. Out of the 120 original *Derg* members, only 47 were charged by the SPP. Many *Derg* members were killed during the internal purge by Mengistu and a few by the EPRP urban guerrilla warfare. For more, see *Mengistu and others*; Haile-Mariam 1998/99, pp. 675 *et seq*; Tiruneh 1995; Marcus 1994; Babile 1989; Hiwet 1975; Habte Selassie 1980; Clapham 1988; Woldegiorgis 1989; Henze 2000. According to the posthumous autobiography of the late Colonel Debela Dinsa, the founding members of *Derg* was 120 but because of 12 individuals' failure to submit an authenticated letter that they were sent by their respective representatives, the numbers were reduced to 108. Hence, the founding members of *Derg* were 108. See Dinsa 2014. The SPP stated that the original members of *Derg* were 108. See Chief Prosecutor Special Prosecutor Girma

officers, those above the rank of major were not sent by the divisions because of their plausible nexus to the imperial regime.²⁷

Mengistu Haile-Mariam (a major then), who was sent by Harar's Third Division, was appointed as chairman, and Atenafu was appointed as a vice-chairman of the Co-ordinating Committee.²⁸ The *Derg* immediately ordered the arrest of magnates, dignitaries, trusted friends, advisors and high officialdoms of the Haile Selassie regime.²⁹ The powerless Emperor could not do anything to prevent the arrests. On 5 July 1975, the men in uniform deposed the new Prime Minister, Endalkachew, and incarcerated him together with the other cabinet members. Michael Imeru, a relatively liberal reformist and a son of high nobility, was appointed as Prime Minister. Upon coming to power, Imeru swiftly tried to make the Emperor a constitutional monarch.³⁰ The draft constitution was stillborn, as Imeru did not have enough time to finalise the reform. The *Derg* continued to neutralise the Emperor's regime and to dismantle institutions loyal to him, *inter alia*, the Imperial Bodyguard, the Crown Council and the Special Court.³¹ In the meanwhile, the *Derg* also continued to discredit and vilify the imperial family by using sundry of a campaign of disparagement. As noted by Marcus:

The climax to the campaign of vilification came on the evening of 11 September, when the capital's television station broadcast two shows, one contrasting the lives of the people with the comforts afforded the emperor's dogs, and the other, a doctored version of the previous year's BBC show on the famine, which interspersed pictures of the tragedy with shots of the lavish life led by the imperial family and the aristocracy.³²

The videos transmitted on 11 September, which is the first day of the Ethiopian New Year, revealed the Emperor's greedy accumulation of wealth while vast numbers of ordinary people were dying because of the apocalyptic famine. The broadcast videos wholly tarnished the little remaining reverence for the Emperor and intensified popular anger against him. This state of affairs helped to give legitimacy to the revolution. With this, the *Derg* garnered greater popular support to dethrone the Emperor.

The *Derg* which had no precise ideological orientation or programme continued to grope into a sort of *coup d'état*, dismantling the imperial regime and isolating the long-reigning Emperor. At the end, the *Derg* abolished the long-reigning monarchical system which stretched back about 3,000 years. On 12 September 1974, a

Wakjira Report to the Parliament Part 1 at 4:37–4:40, available at <http://www.ethiotube.net/video/8192/Documentary-findings-of-human-rights-abuses-during-Red-Terror-era-Part-1>. Accessed 15 June 2016.

²⁷ Besides, soldiers with higher ranks were reluctant to join the Committee perhaps because they did not take the Committee seriously and did not imagine (and expect) at the time that the Committee would end up becoming the collegial heads of state of the country.

²⁸ Marcus 1994, p. 187; Markakis 1979, pp. 14–15.

²⁹ Clapham 1988, p. 40.

³⁰ Clapham 1988, p. 40.

³¹ Marcus 1994, pp. 187–189.

³² Marcus 1994, p. 188. See also Ayele 2000, p. 127; Henze 2000, pp. 282–284.

jittery *Derg* member, Debela Dinsa³³ stood before the Emperor and read out the proclamation that deposed the Emperor who was for so long regarded as an elect of God.³⁴ He was then taken to the Fourth Division headquarters in the back seat of a Volkswagen where he stayed under some sort of house arrest until his death in a mysterious circumstance. The military *junta* formalised its power and took all governmental powers.

Concisely, the Haile Selassie government's continued unresponsiveness and reluctance to alleviate the economic crisis, famine, dissatisfaction of soldiers, students, teachers and taxi drivers and others, fuelled the 1974 popular revolution. This cost the Emperor his throne and as we will see shortly his life. The absence of any organized strong groupings or leadership, following the popular movements against the Haile Selassie regime, created an ideal opportunity for politically inexperienced lower level and middle-ranking officers to 'hijack' the popular revolution and be elevated to the echelons of power. Simply put, the political vacuum that followed the revolution enabled men in uniform to assume power.

2.2 From an Aristocratic Feudal Monarchy to the Dictatorial Military Junta

The *Derg* officially assumed full governmental power on 12 September 1974,³⁵ and started leading Ethiopian society in a socialist direction, based on the hotchpotch motto '*Ethiopia Tikdem*' (Ethiopia First).³⁶ The law that dethroned the Emperor, banned and criminalized all kinds of opposition, demonstration and declared a state of emergency.³⁷ In other words, the law negated the rights for which the people had struggled. The same law also renamed the *Derg* as the PMAC.³⁸ Later, in the 1980s, the PMAC was re-christened as the PDRE, following the establishment of

³³ He is one of the defendants convicted of genocide and other crime in the *Mengistu et al* case. For more, infra Sect. 5.3.4.

³⁴ Amnesty International 1991b, p. 6.

³⁵ This is the second day of the Ethiopian New Year 1966. Since then 12 September had been celebrated as Revolution Day until the demise of the *Derg*. Andargachew argued that although *Derg* officially took governmental power on 12 September 1974, '[s]ince, in the summer of 1974, the *Derg* was already in a position to declare curfews, effect arrests, confiscate assets and appoint ministers including the premier, it can arguably be maintained that it had become the government as of 28 June 1974, when it was established.' Tiruneh 1995, p. 70.

³⁶ Article 2 of Proclamation 1 of 1974, the first law that the *Derg* promulgated, succinctly stated that the Emperor was deposed on 12 September 1974. For detail discussion on the Mengistu regime, see Tiruneh 1995, pp. 70–71; Zewde 2002; Clapham 1988; Marcus 1994; Haile-Selassie 1997; Hiwet 1975; Ottaway 1990; Ottaway and Ottaway 1978; Harbeson 1988; Keller 1989; Amnesty International 1991a,b, p. 6; Human Rights Watch 1994, p. 6; De Waal 1991.

³⁷ Article 8 of Proclamation 1 of 1974.

³⁸ See also Proclamation 2 of 1974. This Proclamation declared the PMAC as the (collective) head of state and government.

the Workers Party of Ethiopia—the only legitimate monolithic party. Though the *Derg* was officially transformed into the PMAC, the two were the same entities, with little difference between them. Even to date, the PMAC and the PDRE are popularly referred to as the *Derg*.³⁹

By considering itself as the vanguard of the revolution, the PMAC took over control of the government apparatus. Upon taking power, the council of military members abolished Parliament, suspended the Constitution, and arrested many more imperial dignitaries, as well as high-ranking civilian and military personnel. After abolishing all remnants of the imperial regime and declaring that Ethiopia is ‘free from aristocratic monarchy’, the *Derg* was expected to address sundry political issues, *inter alia*, the Eritrean crisis, the fate of detainees, demands for the establishment of popular governments, and the question of ‘land to tiller of the soil’.

As noted above, at the outset all members of the *Derg* were below the rank of major. Succinctly put, they were middle and lower ranking politically inexperienced officers. Aman Mikael Andom, who was not an inner member of the *Derg* and a brave soldier with a good popular reputation for his role in the Ethio-Somalia war of 1963, was appointed as a chairman of the *Derg*.⁴⁰ He was Minister of Defence in Mikeal Imeru’s cabinet.⁴¹

Mengistu, who was the chairman of the Committee till September 1974, favored the appointment of Aman. The *Derg* appointed a chairperson from outside of the Committee, mainly to gain public acceptance and respectability, to enhance the leadership stature of the *Derg*, and to reduce the internal power struggle among the members which bedeviled the *Derg* at that time.⁴² Mengistu Haile-Mariam and Atenafu were appointed as first and second vice-chairmen, respectively. Though Aman was appointed as a chairman of the Council, the *de facto* power was exercised by Mengistu. In other words, Aman was used as a front-man or figurehead to garner public acceptance for the *junta*. Mengistu remained the hard-core man behind all activities of the *Derg*. Even though at that time Mengistu had not yet climbed the political ladder, he was the *de facto primus inter pares*.

Shortly after taking power, the *Derg* organized and restructured itself into a General Committee and subcommittees through which it exercised collective legislative and executive functions.⁴³ The General Committee or Politburo was comprised of representatives of the subcommittees. The four subcommittees that were established were: the Executive Committee; the Planning and Directive Committee; Information and Public Relations Committee; and the Disciplinary

³⁹ For the purpose of this book, the author uses the term *Derg* to refer to the whole reign of the Mengistu regime.

⁴⁰ Marcus 1994, p. 189. Cf Tiruneh 1995; Tola 1997; Zewde 2002; Amnesty International 1991b, p. 6.

⁴¹ Marcus 1994, p. 189.

⁴² Schwab 1985, pp. 20–21; Zewde 2002, p. 234.

⁴³ Tiruneh 1995, p. 165.

Committee.⁴⁴ The General Assembly of the *Derg* appointed the members of the committees.

The structure of the *Derg* was not static but was continually revisited and expanded. For instance, in late 1974, some 12 committees replaced the existing subcommittees.⁴⁵ The newly established committees include Political and Foreign Affairs, Legal Affairs, Information and Public Relations, Defense Administration, Prison Affairs and National Development, and Security Confiscations. The General Committee was also replaced by the ad hoc Supreme Organizing Committee made up of the chairperson of each subcommittee, a chairman and the two vice-chairmen of the *Derg*.⁴⁶ The *Derg* continued its collective leadership of the country through those organizational structures of committees whose relationship to each other was not very clear.

The ad hoc Supreme Organizing Committee had supreme powers and the final say. It played different significant roles in the collective administration of the *Derg* by adopting several policies, such as land nationalization and the implementation of the National Democratic Revolutionary Programme. As Andargachew observed, it is possible to compare the exercise of power by the ad hoc Supreme Organizing Committee to that of the King whom it had replaced. As aptly stated 'the Committee inherited the King's powers and, like him, left the question of initiating, drafting and implementing laws and policies to the cabinet and the other public authorities concerned with the matter at hand, subject to final approval of the policy by itself.'⁴⁷

The restructuring of the *Derg* continued. Proclamation 108 of 1976 once again restructured the *Derg* afresh. Accordingly, the Congress replaced the General Assembly, and the Central and Standing Committees replaced the subcommittees. The Central Committee consisted of 40 *Derg* members, whereas the Standing Committee was composed of 17 prominent *Derg* members.⁴⁸

This restructuring of the *Derg*'s organizational framework was effected with the aim of curbing the dictatorial and absolutistic tendencies of Mengistu and his cronies.⁴⁹ Before this reorganization, all *Derg* members were collective heads of state. The 1976 reorganization of the *Derg* narrowed down Mengistu's *Derg* function and his power. Moreover, the chairman was given some real powers and

⁴⁴ Tiruneh 1995, p. 165.

⁴⁵ Tiruneh 1995, p. 168.

⁴⁶ The members of the ad hoc Supreme Organizing Committee, include Teferi Benti, Mengistu, Atenafu, Major Sisay Habte, Moges Wolde-Michael, Alemayehu Haile, Major Beharu Baye, Major Tesfaye Gebre Kidan (chairman of the Defense Administration who later became the interim President for about a week when Mengistu fled to Zimbabwe), Major Demise Deressa, Major Take Tulu (chairman of the Security Department) and Captain Kassaye Argaw (chairman of the Prison Department). For more details, see Tiruneh 1995, p. 168.

⁴⁷ Tiruneh 1995, p. 171.

⁴⁸ See generally Proclamation 108 of 1976.

⁴⁹ Tiruneh 1995, p. 168.

declared as head of the state. Following the reorganization, Atenafu and Alemayehu Haile⁵⁰ were given significant powers.

Before the reorganization of the *Derg* in December 1976, the powers of the chairmen of the *Derg* (both Aman and Tefari) were not real but only nominal. The chairmen were used as frontmen, while real power was exercised mainly by Mengistu. After the reorganization, Mengistu and his henchmen were stripped of most of their powers. Needless to say, Mengistu was not happy with the December reorganization of the *Derg*. And as we shall see shortly, it did not take long for him to regain his power after the February coup.

With regard to different policy matters, such as the Eritrean situation, the fate of detainees and the establishment of a popular government, the first chairman, Aman, adopted a moderate position. He supported negotiation to solve the secessionist policy of the insurgent groups in Eritrea. Unlike many *Derg* members, he was against the execution of detained officials of the imperial regime, and he favored the use of reconciliatory mechanisms.⁵¹ Other *Derg* members, mainly the powerful Mengistu, fiercely opposed Aman's proposal and labelled him a traitor. Together with some *Derg* members, Mengistu espoused a hard line or radical approach with regard to the prevailing policy matters and crises. That means they favored the execution of the detainees and resort to the use of force to solve the Eritrean situation.

Derg members continued stating that Aman 'betrayed' Ethiopia and favored the Eritrean secessionist group, as he originally came from Eritrea. Mengistu sent more troops and tanks to crack down on the Eritrean secessionists by armed force. Aman was most upset by Mengistu's action and retreated to his home. He did not go to the office for some days as a protest against the action of *Derg* members who adamantly refused to give any attention to the proposal of their chairman; instead, many of them became Mengistu's cronies. Fearing that his position was in jeopardy, especially his power consolidation plans, without wasting time, Mengistu sent troops to drag Aman who enjoyed strong support in the army, from his home to be executed with the detained officials of Haile Selassie government.⁵² The revered general fervently refused to be arrested. In order not to fall into the hands of the henchmen of Mengistu, he killed as many as he could, and reportedly on 22 November 1975, he was killed in a shoot-out.⁵³ Although some writers state that Aman committed suicide, Mengistu confirmed that Aman was killed in the gun battle during the melee.⁵⁴

⁵⁰ In addition to other powers given to him, he became the General Secretary of the *Derg*.

⁵¹ Clapham 1988, pp. 43–44; Yohanes undated, p. 51.

⁵² A letter that Mengistu signed bluntly ordered the arrest of Aman. It is safe to assume that execution would have followed had Aman been arrested by the troops because the order conspicuously stated that Aman should be brought to the prison where the officials of the Imperial regime were detained and slated for execution.

⁵³ De Waal 1991, p. 48.

⁵⁴ Ayele 2000, p. 161.

It was said that had the *Derg* officials heeded Aman's proposal, Ethiopia would have taken a different course and the atrocities that ensued would have been averted or lessened. What became clearer after the death of Aman is that 'the possibility of a peaceful process of political accommodation, always a difficult option, died with him.'⁵⁵ Hence, as we shall see below, the radical approach of Mengistu resulted in the death of scores of young educated Ethiopians.

After the death of Aman, the commander of the then Second Division, Brigadier General Tefari Benti, a non-member of *Derg* and a popular hero, was appointed as a chairman of the *Derg*. Until he was finally executed in 1977 by Mengistu's initiation, he was also used in a titular role while real power was exercised by Mengistu.⁵⁶ In sum, the first two chairmen of the *Derg*, who were not from its inner circle, were given 'a crown without the sword'.

Although a commission to investigate the misdeeds of the detained imperial officials had been established, the *Derg* did not wait until the report was completed. Mengistu continued insisting on summary justice for the detained former officials, whose deaths would be reported the following day along with the announcement of Aman's execution. This resulted in summary executions of the 59, commonly referred to as 'the sixty,' officials of the Haile Selassie regime on 24 November 1974.⁵⁷ It was then announced as a necessary 'political measure' against the 'corrupt aristocrats' and Aman. None of the executed officials was even brought before the kangaroo court of the military *junta*. Instead, the matters of all the detained officials were discussed one by one and their execution was decided by votes of *Derg* members as a policy decision.

The military *junta* and its subcommittee were incorrigible archivists, as they kept meticulous memoranda and recorded every meeting even to the extent of describing who was present at the meeting, the decision made, the votes, who was to be killed, when and how, and all other details.⁵⁸ The military *junta* did not find the time to destroy a huge stash of archival documents, like the directives, orders for the

⁵⁵ Clapham 1988, p. 44.

⁵⁶ Clapham 1988, p. 45; Schwab 1985, p. 19.

⁵⁷ For the list of Haile Selassie's officials who were executed by the Mengistu regime, see *SPP v Mengistu* et al, Charge, pp. 12–14. See generally Aneme 2006, p. 65; Haile-Marima 1998/99, p. 677.

⁵⁸ It was stated in the order of the *Derg* that Mengistu signed for the execution of the Ministers of the Imperial regime. See also Taddise 2006, pp. 115–117; the Report of the Office of the Special Prosecutor (1994), p. 2 ("hereafter the SPP Report"); and Amnesty International 1991b, pp. 6–7. It is stated that 'the security services of his (Mengistu) regime, which took power in 1974, learned the habits of bureaucratic procedure from true masters, the East Germans, who sent Stasi agents to Ethiopia as consultants.' See the Economist, 27 September 2007 available at http://www.economist.com/world/mideast-africa/displaystory.cfm?story_id=9867981. Accessed 15 June 2013. A writer also described the involvement of Stasi agent as follows: 'with the aid of East German Stasi agents, Mengistu's secret police spread throughout the country jailing and killing thousands arbitrarily identified as enemies of the state.', see Mquillan 2010 available at <http://www.irishtimes.com/news/ethiopia-still-haunted-by-memory-of-derg-genocidal-regime-1.563626>. Accessed 12 January 2016.

execution of detainees, reports of summary executions, and other details of its heinous activities. This is evident from the fact that the decision to summarily execute the 60 officials is stated conspicuously in the order signed by Mengistu,⁵⁹ and in the minutes of the *Derg*'s General Assembly meeting of November 1974, which discussed the fate of the imprisoned imperial officials as an item on the agenda and a decision was made to execute them. The SPP report stated as follows:

The minutes include information about Derg members were [sic] present at the meeting and the comments they made during the discussions. Each former official's case was brought to the General Assembly for discussion. Each official was discussed separately and an order given on [sic] each individual. The decisions were unanimous regarding the 60 ex-officials that were ordered to be executed.⁶⁰

As stated above, it is clear that the *Derg*, with the most elementary dispensation of justice, wiped out the erstwhile regime's ministers and military personnel in one blow. Simply put, the military junta summarily executed the Haile Selassie officials who could not have caused any real threat to its power.⁶¹ It would have been apter to await the outcome of the Commission, or at least try them for any of the crimes they allegedly committed. The *Derg* ordered all of them to be strangled, and that their corpses be buried in a mass grave beneath the infamous Alem Bekagn prison in Addis Abeba.⁶² The Argentinean forensic experts exhumed the graves in the 1990s.⁶³ The mass execution of the high dignitaries of the ousted regime underscored the *Derg*'s rejection of due process of law and the beginning of the subsequent carnage and series of summary justice. It introduced a reign of terror and buried any hope that the 1974 revolution would remain bloodless, as epitomized in the motto 'let Ethiopia progress without blood'.

On 25 August 1975, the *Derg* allegedly strangled the inept Emperor who was detained at the time the army took control of the government.⁶⁴ Mengistu

⁵⁹ Mengistu's order for the execution of the Ministers of Imperial regime.

⁶⁰ SPP Report 1994, p. 2.

⁶¹ Even if they posed a real threat to the power of the *Derg*, it does not justify such summary execution without any semblance of justice and opportunity to defend themselves.

⁶² Alem Bekagn literally means 'farewell to the world'. It was an infamous prison used by successive repressive regimes in Ethiopia for torturing, killing, and oppressing dissidents. It was similarly used by the *Derg* to incarcerate, torture, and decimate Ethiopian youths. The new African Union's headquarters and conference hall has been built on the site. Interestingly, the African Union Human Rights Memorial Project Office, which aims to preserve and recognize the memories of mass atrocities, and remember the victims of mass atrocities in Africa, rests on the same compound. Thus, arguably, the place has been turned into a place of hope and remembrance of victims of state sponsored violence in Africa. Details about the Memorial available at <http://alembekagn.org/>. Accessed on 24 June 2014. See also AU 2015; De Waal and Ibreck 2013, pp. 191–215. For the exhumation and reburial of the imperial officials' remains, see <https://www.youtube.com/watch?v=OL5tYkJj020> (in Amharic, till 3:25). Accessed 27 June 2016.

⁶³ For the exhumation and reburial of the imperial officials' remains, see <https://www.youtube.com/watch?v=OL5tYkJj020> (in Amharic, till 3:25). Accessed 27 June 2016. See also *infra* Sect. 4.3.1.

⁶⁴ SPP Report 1994.

repeatedly denied the killing of the Emperor, stating that there was no reason for which his regime should kill the feeble-minded 83-year-old monarch.⁶⁵ He stated repeatedly that his regime was affording the Emperor proper treatment and that he was being kept in a sort of house detention for his own safety and security.⁶⁶ According to Mengistu, the death of the Emperor was caused by complications resulting from surgery performed for prostate cancer from which the Emperor was suffering. Nevertheless, in its report and in the charge sheet, the SPP stated that the Emperor was murdered by the Mengistu regime.⁶⁷ Subsequent exhumation by the forensic experts revealed that the corpse of the Emperor was interred under the water bin of Mengistu's personal office.⁶⁸ The *Derg* also killed the patriarch of the Ethiopian Orthodox Church, which professes the faith of the dominant religion of the country.

All this shows that the junior military officers started a violent campaign from the outset. The summary execution of the officials of the old regime by the ousting one was emblematic of the latter's plan to repress dissidents and those whom they considered an obstacle in their path to assume power.

Following the decimation of the former Emperor's officials, the *Derg* members who opposed Mengistu's brand of socialism and who took different political positions, were castigated as 'counter-revolutionaries'. They became the next target of Mengistu.⁶⁹ Tefari Benti, the chairman of the *Derg*, took a peaceful-reconciliatory approach to solving the problems of Ethiopians. While addressing the masses, he stated unequivocally that all the leftist cliques, including the Ethiopian People's Revolutionary Party (EPRP), should set aside their differences and come forward to work together.⁷⁰ He made a plea for national reconciliation, which caused him to be labeled by Mengistu and his henchmen as the EPRP's sympathizer.

Tefari's call was meant to harness all the progressive or revolutionary groups in an effort to resolve conflicts amicably. However, Mengistu and his cronies vehemently rejected Teferi's call, which if embraced, would have opened the door to peace by averting the tragic course of events that followed.⁷¹ The spurning of Teferi's overtures to pave the way to peace arguably sowed the evil seeds from which a campaign of destruction and annihilation sprouted. Mengistu moved quickly to arrange for the execution of Tefari and six other officers who played a

⁶⁵ Ayele 2000b.

⁶⁶ Ayele 2000b.

⁶⁷ *Infra* Sect. 5.3.1.

⁶⁸ The SPP Report 1994; and Haile-Mariam 1998/99. It was only during the judgment in the *Mengistu and others* case that the details surrounding the death of the Emperor were revealed. The Court decided that the Emperor was killed by the order of *Derg* officials, for details, see *infra* Sect. 5.3.3.

⁶⁹ Schwab 1985, p. 36.

⁷⁰ Schwab 1985, p. 36.

⁷¹ See generally Tiruneh 1995; Marcus 1994; Tola 1997; Zewde 2002.

significant role in curbing Mengistu's consolidation of his dictatorship.⁷² Mengistu accused Teferi of an attempted coup.⁷³ This was his way of neutralizing his political rivals whenever he suspected them of thwarting his uninhibited lust to consolidate his power.

After orchestrating the killings of the two chairpersons and other *Derg* members whom Mengistu considered a threat to his push for power consolidation processes, a junior military officer graduate of the military academy in Holeta,⁷⁴ emerged as the primary and undisputed leader of the *Derg* in February 1977. Mengistu always defeated the arguments of his opponents by way of summarily executing them. That was what he did in the February coup. Following the February coup, the *Derg* was reorganized.⁷⁵ Mengistu regained the powers that were taken from him following the December 1976 reorganization. The law declared Mengistu not only chairman of the *Derg* but also head of state and commander-in-chief of the army.⁷⁶ Mengistu also retained the prime ministerial powers. Over and above this, the draconian legislation authorized Mengistu to take revolutionary measures against the 'anti-revolutionary elements.'⁷⁷ In short, 'the 3 February incident opened the way for Mengistu's meteoric ascent to the height of absolutism.'⁷⁸ Clinging jealously to power, Mengistu continued his internal political purge and killings of the *Derg*

⁷² The officers who were executed along with Teferi Benti were Captain Alemayehu Haile, Captain Moges Wolde-Michael, Lt. Col. Asrat Desta, Lt. Col. Hirui Haile Selassie, Captain Tefera Deneke, and Corporal Haile Belay. See Markakis and Ayele 1977, p. 103; Haile-Mariam 1998/99; Tiruneh 1995, p. 190.

⁷³ Teferi was the chairperson and leader, if anything threat of a coup came from the ranks of those who wanted his position.

⁷⁴ The darker-skinned Mengistu was born in 1937 in Walayita, in the Southern part of Ethiopia. His father was a member of Ethiopian army while his mother was a domestic worker. It has been stated that Mengistu was discriminated against because of his dark skin and that might have later played some role for his punitive measures against the royal families, nobles, and other elites. He was recruited into the Ethiopian army at a young age; and graduated from Holeta Military Academy in 1966. In the late 1960s, he was sent with many other military personnel to the United States for advanced military training. Following his return, he became a major in 1974. Mengistu continued to quickly rise through the ranks of the army and became Lt. Colonel in 1976.

⁷⁵ Proclamation 110 of 1977. This law abrogated Proclamations 2 of 1974 and 108 of 1976, which defined the power and responsibilities of the *Derg*. See Article 21 Proclamation 110 of 1977.

⁷⁶ The law conferred the following powers and responsibilities on the Chairman of the Council, i.e. Mengistu: directing affairs of state, chair of the various committees (Congress, and Standing Committee), supervising the implementation of decisions of the various committees, coordinates activities of the Ministries and deciding on administrative matters of same. Article 8 Proclamation 110 of 1977.

⁷⁷ The law authorized the Chairman of the Council to 'safeguard the peace and order of the broad masses and the unity of the country; take measures on anti-people and counter revolutionary elements.' Article 8 (9) Proclamation 110 of 1977; Tiruneh 1995, p. 192.

⁷⁸ Tiruneh 1995, p. 192.

leaders and members, such as the vice-chairman, Atenafu, who opposed his political position, and advocated for negotiation to resolve the national crisis.⁷⁹

As a head of state and absolute leader of the *Derg*, Mengistu faced various problems. There were an escalating plethora of civilian opposition groups, which pressed for the establishment of popular government. They criticized the *Derg* for stealing the popular revolution. The fight of the insurgents in the north presented itself as yet another challenge for Mengistu. Externally, Somalia's regime of Said Barre was preparing to invade Ethiopia to occupy the Somali populated Ogden area in the east. Mengistu resorted to force to solve all the problems confronting him, including increased political opposition in the cities. Mengistu reacted swiftly, unleashing a violent campaign of suppression. The section below discusses the nature of the main civilian opposition to the *Derg* and Mengistu's response.

2.3 The Urban Opposition Against the *Derg*

The law that empowered the overthrow of the imperial regime not only suspended the 1955 Constitution and dissolved the Imperial Parliament, but also prohibited any sort of public demonstration or strike. As Beharu puts it, 'a child of the popular movement, the *Derg*, now disowned its parent.'⁸⁰ The military *junta* denied the populace the rights for which they had fought. Although the military officers claimed to be only provisional administrators in the lead-up to the establishment of a civilian government, with time it became patently conspicuous that the low and middle-ranking officers had planned to rule the country with an iron fist and were never showed intent on lifting the prohibition of strikes. The military adamantly refused to live up to its vows to return to its barracks.

The *Derg* not only prohibited any sort of demonstration and opposition to its amorphous nationalistic motto, *Ethiopia Tikedem*,⁸¹ but it also enacted draconian laws which criminalized any kind of demonstration. The anti-government opposition was deemed to be counter-revolutionary.⁸² However, this did not thwart those

⁷⁹ De Waal 1991, p. 51; Halliday and Molyneux 1982, p. 9; Schwab 1985, pp. 36–45; Markakis 1979, p. 16. Atenafu opposed Mengistu's *Abyotawi Seded* and he did not join it. Instead he established a party called *Abyotawi Seif* (Revolutionary Sword). But before he made any significant move, Mengistu got rid of him. The execution of Tefari and Atenafu was never decided by the *Derg* members, but carried out on the personal order of Mengistu. For more details, see Tola 1997, pp. 100–101.

⁸⁰ Zewde 2002, p. 236.

⁸¹ The radical intelligentsia vigorously opposed the motto, replacing it with their slogan 'the broad masses of Ethiopia first'. For detailed discussion, see Markakis 1979, p. 5; Tiruneh 1995; Tola 1997; Tadesse 2000; Assegid 2000; Halliday and Molyneux 1981; Haile-Selassie 1997; Lefort 1983; Vivo 1978; Keller 1989.

⁸² Under the Special Penal Law promulgated by the *Derg*, various broad categories of vaguely defined political crimes were envisioned. For example, as enshrined under the special law, any

who spearheaded the 1974 revolution from pressing their demands for a popular democratic government.⁸³ This move on the part of the junior military officers spurred and honed another wave of protests, this time coming mainly from the civilian leftists. They ranged from students and teachers to a host of organized movements which had opposed the aristocratic monarchy and led the 1974 revolution.⁸⁴

Despite the populace calling for the establishment of a provisional popular government, the *Derg* unwaveringly refused to yield and continued to strengthen the military regime. Even the units which appointed and delegated representatives to the *Derg* later lost any form of control over the delegates.⁸⁵ Those who had mandated them never imagined that the commissioned and non-commissioned junior officers would come within reach of wresting power from the Emperor, for it was not the purpose for which they had been delegated to the *Derg*. When Mengistu was requested by his former division to return to his military station, he not only shrugged off the request, but also took punitive measures against some of his former colleagues. In essence, the *Derg* regarded itself as a legitimate vanguard of the revolution and for them '[t]o return to the barracks was tantamount to betraying the revolution.'⁸⁶

The opposition against the *Derg* intensified by way of urban civilian protest action. Civilian leftists split into different cliques and started to organize themselves into Marxist-Leninist movements.⁸⁷ Most of the civilian oppositions sprang from the student movements.⁸⁸ They were descendants of the Ethiopian student movements which had led the 1974 February revolution. The EPRP and the All Ethiopian Socialist Movement (*MEISON*) were among the most dominant civilian opposition groups demanding the establishment of civilian government and pressurizing the military to go back to its barracks.⁸⁹

The EPRP was established in April 1975. It remained a surreptitious urban movement for a few months before it officially declared its existence by propagating its programme throughout the country in August 1975.⁹⁰ From then '*Democracia*' (Democracy) was identified as an organ of the party. The EPRP continued its strong opposition against the *Derg* in the pages of the influential newspaper *Democracia*,

contact with anti-revolutionary elements, meaning the EPRP members or alleged supporters, was a capital crime. Those vaguely defined political offences were used as a catch-all instrument for suppressing the increased political opposition from the EPRP. See Special Penal Code Proclamation 8 of 1974, and also the Revised Penal Code Proclamation 214 of 1981, which later abrogated the former.

⁸³ Tola 1997, p. 30.

⁸⁴ Zewde 2002, pp. 236–238; Marcus 1994, pp. 198–205; Tiruneh 1995, pp. 130–136.

⁸⁵ Tiruneh 1995, p. 135; Zewde 2002, p. 234.

⁸⁶ Zewde 2002, p. 238.

⁸⁷ Marcus 1994, p. 200.

⁸⁸ Tiruneh 1995, p. 135.

⁸⁹ See generally Tadesse 1998; Assegid 2000.

⁹⁰ Tola 1997, pp. 36–51; Markakis and Ayele 1977, p. 99.

which found wide support and readership amongst the youth. The EPRP pamphleteered and distributed its paper, defying the *Derg*, and aimed to infiltrate different mass organizations.⁹¹ On the other hand, *MEISON* had emerged as a political movement in March 1976. Haile Fida, a man who had spent long years in exile in France, was its leader.⁹² *MEISON* used its organ called '*Yesefiw Hezeb Demets*' (the Voice of the Masses) to reach the public.⁹³

Due to the military government's refusal to establish a popular government, the EPRP and *MEISON* started to criticize, defy, and discredit the *Derg* systematically using their respective organs. The two leftist cliques tried to reach out to the public via their influential papers mentioned above.⁹⁴ The EPRP and *MEISON* were not the only leftist groups. The *Derg*'s refusal to establish a people's government spawned several other opposition groups. Those clandestine groups included: the Oppressed Ethiopia People's Struggle (known by its Amharic acronym as *ICHAAT*) led by Baro Tumsa; *Wazlig* (the Proletariat or Labour League) led by Senay Likke; the Marxist-Leninist Revolutionary Organization (*Malared*); and the Ethiopia Democratic Union (established and mainly composed of remnants of the Haile Selassie regime).⁹⁵ At the outset, they all opposed the military *junta*. Most of the civilian leftists shared common ideologies and policies. Almost all of them were predominantly urban based, mainly in Addis Abeba. Their differences were mainly tactical rather than ideological, as they all espoused Marxist- Leninist ideas.

The tactical difference between the cliques, especially the two dominant groups, reached its climax when *MEISON* recognized the leadership of the military and showed its preparedness to cooperate with the dreadful *Derg*. *MEISON* became an ally of the *junta* in 1976. *MEISON*'s rapprochement with the *Derg* constituted its final rupture with the EPRP, with the latter bent on toppling the military *junta*, which it considered as the usurper of the popular revolution and an obstacle to the establishment of democratic government.⁹⁶

In the EPRP's thinking, the military had no transitional role to play and should have returned to barracks immediately to prepare itself to accept a civilian authority. The EPRP regarded the military as opportunists who had stolen their programs, ideas, and ideology. The EPRP was desirous of a state based on elections and popular authority, even at the expense of state sovereignty. The party, in principle, accepted the right of nationalities to secede from Ethiopia, although it preferred to see the empire's peoples construct a state based on respect for cultural autonomy.⁹⁷

From the point of view of the EPRP, the *Derg* was becoming chauvinistic; hence the demand that its members should return to barracks. In contrast, *MEISON*, which

⁹¹ Tiruneh 1995, pp. 134–138; Zewde 2002, pp. 236 *et seq.*

⁹² Tiruneh 1995, p. 121; Assegid 2000.

⁹³ Zewde 2002, pp. 236 *et seq.*

⁹⁴ Zewde 2002, pp. 236–245.

⁹⁵ Tiruneh 1995, pp. 121 *et seq.*; Zewde 2002, pp. 244–248.

⁹⁶ De Waal 1991, pp. 101–102.

⁹⁷ Marcus 1994, p. 194.

agreed to work with the *Derg*, believed that the *Derg* could easily be tamed and made to transfer power. *MEISON* opted for the critical alliance with the *Derg* on the assumption that it would eventually steer the *Derg* in the desired direction and finally to assume power itself. On the other hand, the *Derg* desperately needed a civilian leftist ally to drive a wedge between the intelligentsia. In addition, it needed leftist intellectuals to school it in socialist theory and policymaking. Accordingly, the *Derg-MEISON* alliance was boosted from the moment *MEISON* expressed its support for the *Derg*, with the latter using it as its advisor. Other leftist groups like *ICHAAT*, *Malered* and *Wazlig* followed *MEISON*'s approach of cooperating with the *Derg*.

As stated above, even though there was a plethora of mushrooming, clandestine, civilian opposition movements that resurfaced in 1975 and 1976, not all of them were implacably opposed to the *Derg*. As Beharu aptly noted, *MEISON* and *Wazlig* were vying for favor and attention from the *junta*.⁹⁸

Leading members of the two organizations (*MEISON* and *Wazlig*) were reportedly giving lessons to some *Derg* members on the nuts and bolts of the Marxist-Leninist theory. However, the power-hungry Mengistu charted his own path by setting up an organization dubbed Revolutionary Fire (*Abyotawi Seded*) in the summer of 1976. *Seded*'s emergence was facilitated by *Wazlig*, or especially its chairperson, Senay Likke.⁹⁹

Seded, Mengistu's political organization, and all the civilian leftists which allied with the *Derg* grouped to the Provisional Office of Mass Organizational Affairs (POMOA),¹⁰⁰ which was largely staffed by *MEISON* members or sympathizers. It was a facilitatory body which paved the way for the creation of the Workers Party of Ethiopia (WPE) and PDRE government. Through the instrumentality of 'Revolutionary Ethiopia' (paper of POMOA) and 'Yekatit '66' political school, the POMOA was also mandated to train *Derg* members and politicize the broad masses.¹⁰¹ Mengistu used the coalition successfully to acquire prominence and to boost his power both within and outside the *Derg*.

MEISON played an undeniably significant role in influencing and educating the *Derg* on different policy issues. Most of the ideology and policy of the civilian leftists, including the EPRP's policies, were adopted in the national program of the malleable *Derg*. Most of the policies adopted by the *Derg* were the brainchild of civilian opposition and the result of *MEISON*'s influence on the *Derg*. For instance, Proclamation 31 of 1975, which brought about a prominent change in Ethiopian history, gave effect to one of the pressing demands of the student movement—land to the tiller of the soil—by nationalizing all rural lands. This law owes its genesis to

⁹⁸ Beharu 2002, p. 245.

⁹⁹ Beharu 2002, p. 245. See also Tiruneh 1995; Marcus 1994; Schwab 1985; Assegid 2000; Tadesse 1998; Zewde 2002; Schwab 1985; Tarek 2008, pp. 183–206; Markakis 1979, pp. 3–17; Haile-Mariam 2011; Balsvik 1985; Kebede 2008, pp. 159–182; Markakis and Ayele 1977, pp. 99–108.

¹⁰⁰ Clapham 1988, p. 54. See generally Tola 1997; Tiruneh 1995; Marcus 1994; Markakis 1979, pp. 3–17; Clapham 1987, pp. 151–165; Donald 1992, pp. 28–57; Keller 1985, pp. 1–17.

¹⁰¹ Tiruneh 1995, pp. 162 *et seq.*

the opposition's influence on the *Derg* rule.¹⁰² It ended feudalism and redistributed the land to tenants. It gave farmers usufructuary rights and laid the ground for the establishment of the peasant associations. The peasant associations' leaders were appointed by the farmers themselves. The associations were responsible for the equitable redistribution of rural land, thus replacing the old regime's sub-district administration.¹⁰³ The government used *Zamacha* (co-operation campaign) to implement the rural land nationalization policy. On 26 July 1975, urban land and extra-urban houses were nationalized and *kebeles* (urban dwellers' associations) were established, as a counterpart of peasant associations.¹⁰⁴ It bears noting that the nationalization policy adopted by the *Derg*, which was mainly the result of the civilian leftist's influence, was one of the laudable achievements of the *Derg* that ended the deeply entrenched feudal system in Ethiopia. However, as shall be seen below, during the campaign of Red Terror, the Mengistu regime used peasant associations and *kebeles* as key instruments to kill and to suppress opponents including *MEISON*.

It is undeniable that after *MEISON* allied with the *Derg* it played a significant role in influencing the *Derg* to introduce some change. However, it never managed to persuade the *Derg* to transfer power. Instead, *MEISON* itself, after the EPRP was wiped out, became the first target of the dreadful *Derg* campaign of liquidation.¹⁰⁵ The other leftists who were allied with the *Derg* gained a degree of importance after *MEISON* members were purged and decimated. Nevertheless, it did not take long before the *Derg* turned its wrath on them as well.

Many policies of the EPRP, except the demand for the establishment of civilian government, were reflected, to be more precise, were adopted, in the National Democratic Revolutionary Programme of the *Derg* announced on 20 April 1976.¹⁰⁶ However, the EPRP continued to campaign for an end to the military rule and for the establishment of a democratic government. Its popularity increased and its printed voice, *Democracia*, appealed even to officials and soldiers. The *Derg*'s propaganda against the EPRP gave the latter massive publicity, making it virtually omnipresent. It had managed to infiltrate mass organizations, such as, the peasant associations and *kebeles*, and found favor with some *Derg* members as well. The party also created an affiliation with the Eritrean People Liberation Front, the secessionist group in the north. Unlike the EPRP, *MEISON* lacked mass support. The EPRP's popularity was highly ominous for Mengistu and the pan-Ethiopian civilian organizations allied to the *Derg*, mainly the prominent *MEISON*. Both

¹⁰² Marcus 1994, p. 193; Human Rights Watch 1991b, pp. 9–10.

¹⁰³ Marcus 1994, p. 193. See also James et al. 2002; Tibebu 1995; Zewde 2002.

¹⁰⁴ Proclamation 47 of 1975.

¹⁰⁵ See Zewde 2002, pp. 236 *et seq.*

¹⁰⁶ Tiruneh 1995, p. 228. See also Markakis 1979, pp. 3–17; Schwab 1985; Clapham 1988, 1989, pp. 4–17; Gilkes 1982, pp. 22–27.

considered the EPRP a threat to their power consolidation processes.¹⁰⁷ These developments sowed the seed for the violent terror campaigns and the clampdown on dissidents in the offing.

2.4 The Genesis of the Red Terror and the White Terror

Although it is controversial as to who started the carnage and when, what is clear is that the ‘proper or sheer’ Red Terror was unleashed in September 1976. It came in three waves or phases. But before discussing the waves of the Red Terror, it is important and necessary to analyse briefly the pre-September 1976 terror.

2.4.1 *The Pre-September 1976 Terror*

The terror that the Mengistu regime orchestrated between 1974 and September 1976 is dubbed by some as the ‘kushuk terror’.¹⁰⁸ Writers like Babile noted that the *Derg* resorted to repression right from the outset.¹⁰⁹ As mentioned above, two months after the *Derg* assumed power, it showed its violent behavior by summarily executing the 60 officials of the defunct regime.¹¹⁰ Shortly thereafter, as was subsequently confirmed by the Federal High Court, the *Derg* killed the inept Haile Selassie and the Patriarch of the Ethiopian Orthodox Church.¹¹¹

Furthermore, the *Derg* murdered its first two chairmen and other *Derg* officials. The internal purge of *Derg* members was carried out at the behest of the *Derg* leader, Mengistu. The military officers, too, continued their bloodletting spree against real or perceived dissidents. Notions of reconciliation and justice were non-starters for the junior officers. At the instigation of Mengistu and his hard core supporters, the military *junta* began a clampdown on political opponents by way of torture, arbitrary arrests, and mass executions. Between November 1975 and March 1976, about 1030 people, including the prominent Brigadier General Tadesse Biru, youths, and peasants (known as the Bitchena massacre) were executed.¹¹²

¹⁰⁷ Tiruneh 1995, pp. 208–211; Zewde 2002, pp. 244 *et seq*; Tola 1997, pp. 74–76. See generally Chege 1979, pp. 359–380; Clapham 1988; Tadesse 2000; Schwab 1985; Gilkes 1982, pp. 22–27. Contra, Assegid 2000; Haile-Marima 2011.

¹⁰⁸ Tola 1997, p. 34.

¹⁰⁹ Tola 1997, pp. 32–33. See also Haile 2000, pp. 13 *et seq*.

¹¹⁰ Amnesty International 1991b, p. 15. For more details, see Babile 1997; Taddise 2006, p. 114; Woldegiorgis 1989; Haile Selassie 1997; Tesfaye 2008; Tadesse 2000. See also *infra* Sect. 5.3.

¹¹¹ Haile-Mariam 1998/99, p. 677; *infra* Sect. 5.3. See generally Tiruneh 1995; Bekele 1993; Feleke 2011; Reta 2012. See also Haile-Mariam 2011; Ayele 2008.

¹¹² The SPP Report 1994, p. 3. See also Zewde 2009, pp. 23–24; Zewde 2002, pp. 250 *et seq*.

Despite the brutal repression, strikes by students, workers, teachers, and other dissidents intensified. From May to July, the killing and tyranny of the Mengistu regime continued. During this period numerous students, intellectuals, peasants, and others were killed or tortured. In total, at least 1000 were killed during this time.¹¹³ Though the government disagreed on the number of victims, it never denied the deaths. Rather, the *Derg* tried to justify the deaths by castigating and branding the victims as ‘counter-revolutionaries’, ‘reactionaries’, ‘imperialist’ ‘agents of the CIA’, ‘Kolchaks’, ‘Trotskyites’ and ‘Denikins’, people who opposed the land reform and the popular revolution.¹¹⁴

The *Derg* considered itself a self-appointed, legitimate vanguard of the revolution. To protect the revolution from what it branded counterrevolutionaries, the violent crushing of opponents continued unabated. However, the repression did not dampen the protest; on the contrary, it stoked more resistance. Protests and demonstrations were marked by recurrent shouts for the release of political prisoners, an end to the carnage, and the establishment of a provisional popular government.

Based on the advice it received from *MEISON*, the *Derg* planned ‘house to house searches’ and flushing out of the ‘anarchists’ in Addis Abeba in April 1976.¹¹⁵ A list of the EPRP members suspected members, and supporters were drawn up and handed over to the *Derg* by *MEISON* and *Wazlig* leaders.¹¹⁶ The EPRP revealed this looming *Derg-MEISON* war plan. The other carnage of the pre-September 1976 terror campaign was perpetrated in the May Day demonstrations of 1975 and 1976.¹¹⁷ The *Derg* campaign department, a unit under the Standing Committee chaired by Mengistu, ordered revolutionary action against all who participated in the rally. During the demonstration of workers, students and teachers ‘an imprecise death toll’ of some 40 people was reported at the time.¹¹⁸ Many were arrested and disappeared during the nocturnal mass executions of the post-September 1976 terror.

In general, from the moment it assumed power until September 1976, the *Derg* was indefatigably committed to flushing out and silencing any opposition. The students, intellectuals, workers, etc., who contributed to, and arguably led, the 1974 popular revolution were totally excluded and denied the rights for which they fought. Any form of opposition was made a capital crime. To silence the request of the civilians, the *Derg* resorted to carnage from the beginning.

¹¹³ Tola 1997, p. 45.

¹¹⁴ Tiruneh 1995, pp. 207–210; Yohanes (undated), pp. 58–80; Tola 1997, pp. 44–46.

¹¹⁵ Tola 1997, p. 45. See generally De Waal 1991; Tiruneh 1995; Zewde 2009, pp. 23 *et seq*; Amnesty International 1991b; Human Rights Watch 1991b.

¹¹⁶ Tola 1997.

¹¹⁷ The SPP Report 1994, p. 2; Haile-Mariam 1998/99, pp. 670–99; Aneme 2006, pp. 64–83.

¹¹⁸ Tola 1997; Aneme 2006, pp. 64–70; the SPP Report 1994, p. 2.

2.4.2 *The Post-September 1976 Terror: Qey Sheber*

As we shall see shortly, the difference between the pre- and post-September 1976 terror was the degree and intensity. However, even before September 1976, there was some form of terror. But in September 1976, the mask was off and the terror was openly aimed at flushing out the ‘counter-revolutionaries’.¹¹⁹ In terms of magnitude, the post-September 1976 terror contrasted sharply with the kushuk terror. In September 1976, the Red Terror (*Qey Sheber* in Amharic), unlike the kushuk terror, was typified in a red color visible to everybody. As Babile puts it: ‘The terror is born with the *Derg*, it reached its teen in 1976 and by 1977 it had matured to the full.’¹²⁰

As to when exactly the Red Terror started remains controversial. Many say that it started in September 1976. What is also controversial is who first pulled the trigger.¹²¹ Many protagonists who came up with retrospective accounts of what had happened, including Mengistu himself, tried to whitewash their conduct, attributing all the wrongs to the other side.¹²² No objective account of events exists. Whatever has been said on this issue is questionable and exaggerated; if not downright harmful. This is not to say that the retrospective accounts of the EPRP and *MEISON* members or sympathizers are bias-free and constitute an attempt at self-exoneration.¹²³ As Beharu Zewde rightly puts it, ‘history has become as much a battleground as the political contest and armed clash themselves.’¹²⁴ Therefore, care needs to be taken in presenting an objective account from differing factual versions concerning the polity of the *Derg* regime, as much more has yet to be unveiled adequately and comprehensively.

Be that as it may, with regard to who first fired the shot of terror, some argue that it was the EPRP’s resorting to urban warfare which provoked the *Derg* to retaliate with illegal action. Those who propagate this view criticize the EPRP for having been intransigent.¹²⁵ Schewbe writes that ‘[t]he EPRP was, in fact,

¹¹⁹ Zewde 2009, p. 23; Tola 1997, p. 48; Aneme 2006, pp. 63–70; Human Rights Watch 1994, pp. 5–6; De Waal 1991, pp. 102–110; Amnesty International 1991b, pp. 7–8. See generally Tiruneh 1995; Schwab 1985; Marcus 1994; Clapham 1987, pp. 151–165; Chege 1979, pp. 359–380; Tarek 2008, pp. 183–206; Kebede 2008, pp. 159–182; Kebede 2010, pp. 295–327; Halliday and Molyneux 1982, pp. 5–15; Keller 1985, pp. 1–17; Haile-Selassie 1980, pp. 1–23; Haile-Selassie 1997; Ottaway and Ottaway 1978; Markakis 1987; Tadesse 2000.

¹²⁰ Tola 1997, p. 86.

¹²¹ Zewde 2009, p. 25; Zewde 2002, pp. 252 *et seq.*

¹²² For a detailed account of events from Mengistu’s standpoint, see generally Ayele 2009b; Ayele 2009a; and Haile-Mariam 2011. See also Halliday and Molyneux 1981; Schwab 1985. For a summary, see Zewde 2009, p. 25.

¹²³ For detailed discussion from the EPRP view point, see Tadesse 1998; Tadesse 2000; Tola 1997. For a detailed account of events from the *MEISON* standpoint, see Assegid 2000.

¹²⁴ Zewde 2009, p. 24.

¹²⁵ See generally Schwab 1985; Ottawa 1991; Haile-Mariam 2011.

counterrevolutionary and forced the *Dergue* into the violent position that it took. That violence clarified the determination of the *Dergue* and marked an important stage in the development of the Revolution.¹²⁶ Mengistu himself, unsurprisingly, stated that EPRP started its campaign of assassinating *Derg* officials and supporters.¹²⁷ In other words, the EPRP is blamed for being provocative and had itself to blame for the fatal retaliatory action visited on its members. According to this theory, the *Derg* was then compelled to use the Red Terror in self-defense against the White Terror or urban guerrilla warfare tactics. The retaliatory acts of the *Derg* were officially dubbed the Red Terror and the sporadic EPRP attacks were called the White Terror.¹²⁸

Those holding the contrary view even go as far as to say that the authors who blame the Red Terror on the EPRP are no more than apologists of the *Derg*.¹²⁹ Babile states that the acts of the EPRP (the White Terror) were acts of self-defense against the massacres perpetrated by the *Derg*.¹³⁰ Accordingly, 'neither the EPRP nor any dissenters had fired a single bullet in the cities at the time or before the *Derg* declared its anti-EPRP war.'¹³¹

Nevertheless, to argue that it was the EPRP that had provoked the *Derg* to react with Red Terror, as a means to justify the official campaign of eliminating opponents, is not convincing. The fact of the matter as already mentioned is that the *Derg* resorted to violent measures from the onset before any alleged dissenters had in any way challenged it in a violent manner. Moreover, it was the *Derg* that refused to go back to its barracks, as promised, and to establish a popular government. The *junta* was no less authoritarian than its predecessors. The officers, after restyling themselves as the PMAC, criminalized all demonstrations and strikes, thus shutting off all platforms from which the populace could rent its disaffection with the *Derg*. What is more, the *Derg* went on to violently crush all dissent and to execute dissidents *en masse*. For instance, ten days after the *Derg* ascended to power, the Confederation of Ethiopian Labor Union (CELU) called for a protest and demanded a people's government. The *Derg* reacted violently, dismissing this demand with a statement saying that democracy is not the immediate need of the broad masses.¹³² From then, the CELU, which was previously labelled as apologists of the EPRP, became a target of the *Derg* action until it was finally dissolved and replaced by the *Derg*'s subservient the All-Ethiopian Trade Union in 1975.¹³³

¹²⁶ Schwab 1985, p. 42.

¹²⁷ Ayele 2009a, pp. 179 *et seq.*

¹²⁸ See Zewde 2009, p. 24; Toggia 2012, pp. 265–280.

¹²⁹ Tola 1997, pp. 86–87. See also Tadesse 1998; Woldegiorgis 1989; Fielek 2011; Taddise 2006.

¹³⁰ Tola 1997, pp. 68–69. See Schwab 1985; Ottaway and Ottaway 1978; Ottaway 1990; Haile-Marim 2011; Halliday and Molyneux 1981; Ayele 2009b.

¹³¹ Tola 1997, pp. 70–71.

¹³² Markakis 1979, p. 10.

¹³³ Markakis 1979, pp. 10–11.

The above-mentioned state of affairs forced opponents to ally with the *Derg* or to resort to other alternatives. Babile sums it up as follows, ‘once again, the choice was either to die peacefully (quietly and without resistance) or to resist.’¹³⁴

It would be inappropriate to applaud the EPRP for engaging in an urban armed confrontation (White Terror), as a means to achieve their political ends. In practice, things do go awry, which then results in political crisis. The same can be said about the actions of the leftist civilians. Hence; the civilian leftist also bear the blame for what happened during the *Derg* regime. However, this should not be used as a conduit to justify the savage carnage of the *Derg*. First, because the latter was hooked on ruling by terror from the outset. Secondly and more importantly, determining who shot the first bullet is not pivotal from the strict *legalis sensu* because, as we shall see shortly, the barbarity and intensity of the carnage acts of the *Derg* aimed at wiping out all dissent were disproportionate to the alleged acts of the EPRP. Moreover, serious human rights violations by one party could not be justified by less serious violations of rights by the other group. There is, therefore, no room to justify the Red Terror on the basis of self-defense. Thirdly, the *Derg* took violent action against not only dissidents but also *Derg* leaders and members who advocated reconciliatory measures and who called for a stop to the terror. It is hardly possible to blame the civilian leftist for Mengistu’s violent action against the *Derg* members and chairmen. Furthermore, the pro-*Derg* *MEISON* would later become a victim of the campaign of eliminating opponents during the last phases of the terror in which the disintegrated EPRP had no role to play. Because of all these reasons, it is hardly convincing to blame the dissidents for provoking the ensuing disproportional campaign of eliminating opponents. Even if it were to be insisted that the dissidents’ actions were provocative and were the cause of the ensuing Red Terror, this still does not constitute a justification for the regime’s murderous acts. It is, therefore, submitted that it is irrelevant to engage in a debate about who was the first to pull the trigger. Determining who first pulled the trigger would neither lessen the *Derg*’s culpability nor negate the horrific nature of its conduct.

It is blatantly clear that the two terminologies, White Terror and Red Terror, bywords of the time, were ‘intended to condemn one form of terror and justify another.’¹³⁵ It was a mimicking of the Bolshevik experience, in which, after the attempted assassination of Lenin, the government started to respond by violent campaigns of Red Terror to what was called White Terror action of counter-revolutionaries. The same holds true for the post-September 1976 political violence in Ethiopia. The Mengistu regime castigated the EPRP’s urban guerrilla warfare or sporadic campaign of assassination of *Derg* officials and *MEISON* members as White Terror. Then Mengistu and his civilian allies started the Red Terror, which was essentially a violent campaign to liquidate the ‘counter-revolutionaries’.¹³⁶ This violent campaign of wiping out dissidents by way

¹³⁴ Tola 1997, p. 87.

¹³⁵ Zewde 2009, p. 25.

¹³⁶ Zewde 2002, pp. 154 *et seq*; Haile-Mariam 1998/99, p. 677; Aneme 2006, pp. 63–65.

of arbitrary political imprisonment, extrajudicial killings, torture, forced disappearance etc. spanned a period of two years. The state-sponsored Red Terror came in three waves or phases.¹³⁷ These are discussed below *in seriatim*.

2.4.2.1 Red Terror: Phase One (11 September 1976–3 February 1977)

The first phase of the Red Terror started on 11 September 1976,¹³⁸ two years after the *Derg* assumed power.¹³⁹ On the day of the Ethiopian New Year, the *Derg* officially labelled the EPRP as an ‘enemy of the people’ and counter-revolutionaries. The *Derg*, MEISON and other pro-*Derg* groups denounced the EPRP with recurrent monotony and accused it of committing economic sabotage, blaming it for the tribulations that engulfed the country.¹⁴⁰ In sum, the EPRP was used as a scapegoat for a host of problems that beset the country. As aptly noted by Babile, ‘[i]dentifying EPRP as the counterrevolutionary justified the repression that was being declared at the intensified level. “There is no middle ground,” said the *Derg* and MEISON and ‘*mehal sefari*’ (neutral) became itself an insult word [sic], a criminal offense. The *Derg* specifically declared “he who is not with us is with the EPRP,” the *Derg* and MEISON seemed to say, and as many apolitical intellectuals were to find out later on, he who was not with them was slated for extinction.’¹⁴¹ As such, the EPRP was identified as an ‘enemy of the revolution’ and the *Derg* started to wipe it out.

At this juncture, one may question why the *Derg*-MEISON alliance preferred September 1976. Despite the repressive measures taken by the *Derg* to crush its opponents, the EPRP was increasingly garnering more sympathizers.¹⁴² The *Derg*’s draconian action, ironically, made the EPRP even more popular, and the views expressed in *Democracia* attracted not only the broad masses but also the army.¹⁴³ The EPRP became a real danger and obstacle to Mengistu’s power consolidation process. The *Derg* and MEISON, therefore, regarded September 1976 as a pressing opportunity to take fast and decisive action against the EPRP. Though it was unclear when they would commence their actions, the reason why the *Derg* chose

¹³⁷ Zewde 2009, pp. 25–29. See generally Tola 1997; Tiruneh 1995; Clapham 1988; Zewde 2002; Schwab 1985; Marcus 1994.

¹³⁸ 11 September 1976 is 1st *Meskrem*, the first day of the new Ethiopian year of 1969.

¹³⁹ Zewde 2009, p. 27.

¹⁴⁰ Tola 1997, p. 68.

¹⁴¹ Tola 1997, p. 68. See also Zewde 2009, p. 26.

¹⁴² Tiruneh 1995, pp. 208–209; Tola 1997, pp. 74–76.

¹⁴³ Clapham 1988, pp. 41–45; Tiruneh 1995, pp. 208–2011; De Waal 1991, pp. 102–110; Woldegiorgis 1989; Felek 2011; Tefera 1997; Taddise 2006; Markakis 1979, pp. 3–17; Gilkes 1982, pp. 22–27; Tola 1997, pp. 74–75.

that September can best be elucidated by Mengistu's saying something like this: 'Our enemies planned to eat us for lunch, we ate them for breakfast.'¹⁴⁴

By using the *kebeles* (urban dwellers' associations) and the Israeli-trained unit called the *Nebelbal*, the *Derg* started arresting, torturing, and executing many EPRP members and perceived supporters during house-to-house searches.¹⁴⁵ During this process, 14 people were reportedly killed. In Sebata, a few kilometres southwest of Addis Abeba, 'mutilated corpses of 22 people were uncovered.'¹⁴⁶ Another 30 bodies were found near Kara in Addis Abeba.¹⁴⁷ The horrific nocturnal mass killing continued in Addis Abeba, Dire Dewa, Nazareth and elsewhere¹⁴⁸ As noted by Babile

[e]very night batches of prisoners, almost all of them tortured were taken to the outskirts of the cities and shot to death and dumped into mass graves. Including those who went on demonstration to protest, in the repressions from 21 September to 1 October 1976, about 230 were killed by the soldiers and 'that many corpses were piled high in the central morgue of the Menelik Hospital.'¹⁴⁹

The attempted assassination of Mengistu on 23 September 1976, some 13 days after the *Derg* launched its Red Terror, was attributed to the EPRP.¹⁵⁰ It was said to be the EPRP's response to the *Derg*'s nocturnal massacre and other forms of terror.¹⁵¹ As observed by a writer, Mengistu was injured during the attack. 'Mengistu not only survived the attempt but also used the incident to whip up public solidarity for himself and for the denunciation of the EPRP tactics.'¹⁵² The EPRP rejected this finger-pointing, stating that it issued its official 'urban armed self-defense' order only in October 1976. However, this does not mean that it did not take any action against the Mengistu-*MEISON* violent carnage. On October 2, the EPRP retaliated by killing Fikre Merid, the leader of its main civilian rival.¹⁵³ Then again, in late October, it detonated a device which shattered the Yekatit Political School, which resulted in fatalities and injuries, and damage to property.¹⁵⁴

¹⁴⁴ Tola 1997, pp. 71.

¹⁴⁵ Taddise 2006, pp. 60–87; Tiruneh 1995, pp. 208–209; Tola 1997, pp. 69–71; Markakis 1979, pp. 3–17; Keller 1985, pp. 1–17; Donald 1992, pp. 28–57; Clapham 1987, pp. 151–165; Chege 1979, pp. 359–380.

¹⁴⁶ Tola 1997, p. 69.

¹⁴⁷ Tola 1997, p. 70.

¹⁴⁸ De Waal 1991, pp. 106–108; Human Rights Watch 1994, p. 5; Tola 1997, p. 70; Zewde 2009, pp. 26–27; Tiruneh 1995, pp. 210–14.

¹⁴⁹ Tola 1997, p. 70.

¹⁵⁰ See Tiruneh 1995, p. 186; Marcus 1994; Felek 2011; Ayele 2009a; Haile-Mariam 2011; Taddise 2006.

¹⁵¹ Tola 1997, p. 71.

¹⁵² Tola 1997, p. 437.

¹⁵³ Zewde 2009, p. 26; Tola 1997, p. 71.

¹⁵⁴ Tiruneh 1995, p. 186. See Zewde 2009, pp. 26–27; Tola 1997, p. 82; Clapham 1988, pp. 46–56; Shifaw 2012, pp. 38–50.

The *Derg*'s acts of terror against the EPRP members and sympathizers continued. Between October and November 1976, about 100 EPRP members and perceived sympathizers were executed, many of them between the ages of 14 and 17. *Derg* members were duped into the execution of the youths, including the 14-year-old Babile Haile Selassie.¹⁵⁵ The EPRP, in retaliation, killed about 12 officials associated with the terror.¹⁵⁶ The *Derg* repression against the dissidents continued violently. Generally, violent terror gripped the country. The people were afraid of the brutal carnage perpetrated by *Derg* officials. The latter, in turn, felt threatened by the EPRP's underground urban war.

Some *Derg* members, including the chairman Teferai Benti, Moges W. Micheal, Asrat Desta, Alemayehu Haile, Tefari Deneke, and Hailu Belay, started questioning the brutal killings. They called for the cessation of the savage killings and mass executions.¹⁵⁷ These *Derg* members were the ones who carried out the reorganization and restructuring of the *Derg* in July 1976. This was done to curb the growing dictatorial powers of Mengistu. Most of Mengistu's powers were taken away. Following their insistence to cease the crackdown on the counter revolutionaries, Mengistu found a way to get rid of those persons whom he had regarded as a huge obstacle to his quest for power. On 29 January 1977, Tefari addressed a massive rally at Revolutionary Square. He called for unification and an end to the turmoil. Mengistu and the civilian allies were confounded by Teferi's call. Shortly thereafter, a *Seded* (Revolutionary Flame) squad arrested Tefari and the other aforementioned officials. On 3 February, by personal order of Mengistu, they were all executed. Mengistu accused them posthumously of being sympathizers of counterrevolutionaries.¹⁵⁸

In all, in the first wave of the terror, many perished in secret executions. Though, understandably, there is no exact estimate of the death toll, a minimum of 2,000 members, or perceived supporters of the EPRP, were killed in the first phase of the terror.¹⁵⁹ Many were arbitrarily arrested and tortured.

2.4.2.2 Red Terror: Phase Two (February to November 1977)

After killing the first two popular chairmen of the *Derg* and purging many other *Derg* members who espoused reconciliatory ideas and whom he considered a threat to his power pursuit, Mengistu emerged as the absolute dictatorial leader of the *Derg*. On 4 February 1977, he addressed the masses at Revolutionary Square and condemned the EPRP. Again in April Mengistu addressed a mass rally at Revolutionary Square, where he performed his theatrical act of smashing three

¹⁵⁵ Tola 1997, pp. 82–83.

¹⁵⁶ Tola 1997, p. 81.

¹⁵⁷ Tola 1997, pp. 100–101.

¹⁵⁸ Tola 1997, pp. 100–101.

¹⁵⁹ De Waal 1991, p. 103.

bottles filled with red liquid to show what his merciless regime could do to anyone who opposed the revolution.¹⁶⁰ He condemned the EPRP, EDU, and ELF as enemies of the people. And he declared that the revolution was then officially transformed from a 'defensive to an offensive' one and urged everyone to stand as a vanguard of the revolution by eliminating the 'enemies of the people'.¹⁶¹ During this wave of the terror, the Red Terror was not only officially launched, but it became less selective and more ferocious in its mass executions and street massacres. The law of the jungle pervaded. Mengistu specifically declared that it was necessary to 'carry the Red Terror into the camp of the anarchists, one thousand of them for every militant.'¹⁶² He was not just embarking on arithmetical hyperbole, instead, he was clearly giving his imprimatur to the orgy carnage that his firing squads were about to carry out with intensity. The broad masses were empowered to take 'revolutionary action', which is a euphemism for killing the opponents.

Netsa irmija (license to kill) was introduced in September 1977 to give people unrestrained powers to kill counterrevolutionaries.¹⁶³ These freelance and unhindered killing sprees continued until 1978. The *Derg* resorted to various instruments of terror in its infamous campaign to liquidate opponents. For example, the *kebeles* and revolutionary squads were empowered to kill on sight and on the spot anyone they suspected to be an EPRP member or sympathizer.¹⁶⁴ The security forces (*tsetita*), headed by the innermost member of the *Derg*, Teka Tulu, was one of the instruments of terror used by Mengistu to crackdown on dissidents with bloodletting violence.¹⁶⁵ It had its own prison where it carried out primitive and horrendous forms of torture and murder. One describes the security force as a real murder machine in the service of the terror launched by Mengistu and *MEISON*.¹⁶⁶ The army was also initially employed for these ghastly tasks, but its role was minor. The *Nebelbal* replaced the army and carried out barbaric repression against the EPRP members or supporters, who Mengistu and his henchmen believed that they had wounded them critically and had reduced their political significance.¹⁶⁷ The other prominent real murder and the torturing machine used by the *Derg* for the terror was the *Mereja* (Special Intelligence Operation) which was at first headed by one of

¹⁶⁰ Woldegiorgis 1989, p. 37. See generally Tola 1997; Tiba 2007; Haile-Mariam 1998/99; Zewde 2009, p. 27; Tiruneh 1995; Clapham 1988; Marcus 1994; Haile-Selassie 1997; Hiwot 1975.

¹⁶¹ Tiruneh 1995, p. 206; Taddise 2006, p. 117; Tola 1997; Amnesty International 1991b, p. 7.

¹⁶² Tola 1997, p. 137; De Waal 1991, pp. 102–05; Lefort 1983, pp. 198–200; Amnesty International 1991b, pp. 7–8; Human Rights Watch 1994, p. 5. See also Clapham 1988; Schwab 1985.

¹⁶³ Tola 1997, pp. 145–147.

¹⁶⁴ Tola 1997, pp. 146–147. See generally Tiruneh 1995; De Waal 1991; Aneme 2006.

¹⁶⁵ Tola 1997, pp. 76–77.

¹⁶⁶ Tola 1997, pp. 76–77.

¹⁶⁷ See generally Tola 1997, pp. 76–77; Tiruneh 1995; Clapham 1988; Zewde 2002; Marcus 1994; Taddise 2006; Haile-Selassie 1997; Tesfaye 2008; Markakis 1977; Tadesse 1998; Tarek 1991; Woldegiorgis 1989.

Mengistu's subervients, Daniel Asfaw,¹⁶⁸ and later by Getachew Shebeshi.¹⁶⁹ The *kebeles* and Peasant Association Defence Squads were other infamous instruments of terror used to liquidate opponents. Although the *kebeles* were initially established for the purpose of ensuring the populace's self-governance and promoting the implementation of urban land reform, it was not long before they were purged under the veneer of elections and veered to becoming torturing machines.

What Mengistu and his cronies first did with the *kebeles* and peasant associations was to strengthen control over them by way of cleansing the EPRP sympathizers who had infiltrated them. Then the *kebeles* were authorized to establish *Abyotawi Tibeka* Squads (Revolutionary Defence Squads). During the terror, the *kebeles* were licensed to kill the reactionaries and they unleashed waves of barbaric cruelty in their respective squads that they had established. The 294 *kebeles* (small administrative units) in Addis Abeba which were organized into 25 higher urban associations called *keftegnas* (districts), carried out campaigns of terror even to the extent of murdering an eight-month-pregnant woman.¹⁷⁰ Reportedly, 'the *kebeles* were keen on arresting women and young girls; rape of even underage girls was quite common.'¹⁷¹ Babile Tola stated that among the killers, there was fierce competition to see who had the highest number of killings, arrests, and victims of torture. The reason was that 'a *kebele* which had a low record of arrests and executions was ridiculed, criticized or even viewed with suspicion, which meant all *kebeles* were vying to outdo its rivals by arresting more and killing more "anarchists."'¹⁷² In the competition, Abdullahi Yussuf (West German-educated *MEISON* leader), was one of the notorious savage killers.¹⁷³

The *Seded-MEISON* underground squads were also used to perpetrate savage killings and torture. *Abyotawi Seded* (Revolutionary Flame) was a secret group established by Mengistu and his hard-core militarists on the advice of civilian allies.¹⁷⁴ It had its own underground squads. It used to execute or torture those who were perceived to be a threat to Mengistu. Likewise, *MEISON* also ran squads for the same purpose. Revolutionary defense squads were also established among factory workers and used for liquidating opponents.¹⁷⁵

To sum up, the instruments of death and terror, which were entrusted to take revolutionary measures, included revolutionary defense squads; the police; peasant

¹⁶⁸ Mengistu's security chief and guard. He was killed in the 3 February shoot-out.

¹⁶⁹ Tola 1997, p. 77.

¹⁷⁰ Tola 1997, p. 78.

¹⁷¹ Tola 1997, p. 78.

¹⁷² Tola 1997, p. 79.

¹⁷³ Tola 1997, p. 79.

¹⁷⁴ The individuals who established *Seded* with Mengistu include Fikre Selassie, Legesse Asfaw, Teka Tulu, Tesfaye Weld-Kidan, Daniel Asfaw, Getachew Shebeshi and Ali Musa. For more details see Tola 1997, pp. 79–100.

¹⁷⁵ Tiruneh 1995, p. 209.

association defense squads; urban dwellers defense squads; *Seded-MEISON* defense squads; and the army.

Mengistu controlled many types of machines and instruments of terror. Even before the February coup, Mengistu remained the *Derg*'s hard-core and powerful man. After the February coup in 1977, Mengistu controlled all the powers. He became not only the chairman of the *Derg* but also the head of state, head of government, commander-in-chief of the biggest army, head of different departments, chairman of many committees, the commander of different intelligence departments and security agencies.¹⁷⁶ Besides, he controlled different death squads via his henchmen, like Sergeant Legas Asfaw.

The fearsome and cold-blooded Legesse was entrusted with the power to arm the broad masses and defense squads to liquidate opponents.¹⁷⁷ He served as the ears and eyes of Mengistu. Many *Derg* members remained loyal to Mengistu so as not to face the fate of other *Derg* members who dared to oppose him.

The house-to-house arrests with the full support of civilian allies began on 23 March 1977. The second house-to-house search was carried out from 7 May to 10 October of the same year. In these house-to-house searches and arrests, the murderous machines of terror killed scores of people.¹⁷⁸ House-to-house arrest was generally not just a simple search for supporters of the EPRP; even more, it was nothing less than a ruse to conceal the arbitrary and extensive killings at the whim of the raiders.¹⁷⁹ House-to-house searches and arrests, accompanied by *nesta irmija*, which was first launched in March 1977, led to the deaths of scores of people. In the first house-to-house arrest of the EPRP members and sympathizers, the raiders arbitrarily killed the family of the missing children.¹⁸⁰ Many women were raped. In the house-to-house searches finding copies of *democracia* in a home was a good reason for an execution. In the March house-to-house searches, the EPRP member, Markos Hagos, chairman of CELU, was killed in a shootout. Tesfaye Debessai, another prominent member of the EPRP, who was a Central Committee member, committed suicide by jumping from a building to avoid falling into the hands of the merciless raiders.¹⁸¹

During this phase of the terror, *MEISON* was at the vanguard of the orgy of killing of members of its main opponent, the EPRP. This is best illustrated by the action of its sadistic notorious killer Girma Kebede, who ruthlessly strangled many people during the house-to-house arrests. In the period of house-to-house arrests, Girma Kebede killed about 30 people including an eight-month pregnant woman. He himself was later executed publicly for attempting to kill a close relative of

¹⁷⁶ Tiruneh 1995, p. 210.

¹⁷⁷ Tiruneh 1995, p. 210.

¹⁷⁸ Tiruneh 1995, p. 210.

¹⁷⁹ Tola 1997, pp. 147–49.

¹⁸⁰ See generally, Tola 1997, p. 148.

¹⁸¹ Tola 1997, p. 148; Zewde 2009, p. 27; Shifaw 2012.

Mengistu. Others continued with their violent attacks against the EPRP members and supporters.¹⁸²

During these house-to-house arrests, MEISON-Derg squads blocked the exits from Addis Abeba. The road-blocking death squads embarked on an arbitrary decimation of opponents. Some of the victims killed on the spot were prominent members of the EPRP, such as, Nega Ayele, Melaku Markos, and Yohannes Berhanu.¹⁸³ Another barbaric killing occurred on the eve of the May Day demonstration of 1977. May Day demonstrations were traditionally the only way for the opponents to air their demands and protest against the military junta. Thus, the EPRP organized and prepared for a massive rally, but because the government was tipped off timeously, it was ready for any eventuality. The *Derg* retaliated by starting to kill on 29 April 1977, shortly after the EPRP launched the rally. Some 500 youths were killed.¹⁸⁴ In the next few days, about 1,500 persons were killed with their corpses piled on the strategic corners of Addis streets as a warning for other dissidents who might attempt similar anti-*Derg* demonstrations.¹⁸⁵

Many more were arrested and subjected to grueling torture. Andargachew noted that:

The number of detainees was too great to be accommodated by the existing prisons and police stations; as a result, all the offices of the urban dwellers' associations, the palaces and military garrisons in the towns up and down the country were turned into detention centers. The victims of the mass arrests and those picked up in the streets and their homes were taken to these centers and subjected to some of the most inhuman forms of torture of a cruelty unprecedented in the history of the country.¹⁸⁶

The enormous number of detainees were subjected to myriad forms of torture, which were routine during the terror. Sexual torture, mutilation, and beating were rampant.¹⁸⁷ The crushing of testicles by tying a heavy thing—a water or sand filled bottle around man's genital organ—was the other common means of torturing male detainees. Mutilation of a woman's sexual organ, and rape including gang rape, were reportedly pervasive. The merciless *Derg* officials also used to immerse prisoners in boiling oil/water and dump them into a barrel full of cold water as another torture method. As pointed out by one writer:

¹⁸² Alemu Abebe and Asazenewu Bayisa are some of the few, like Girma, who ruthlessly liquidated many. For a more factual account, see Tola 1997, pp. 138–143.

¹⁸³ Tola 1997, p. 150.

¹⁸⁴ Tola 1997, p. 161.

¹⁸⁵ Tola 1997, p. 161; Tiruneh 1995, p. 211; Human Rights Watch 1994, pp. 6–7.

¹⁸⁶ Tiruneh 1995, pp. 211–212.

¹⁸⁷ As noted by Tola, 'mutilation consists of stripping off of the skin from the arms and thighs with a sharp knife, the pulling out of nails, cutting fingers piece by piece, the ripping of noses and cheeks by pincers, the pulling of the pubic hair and skin by pincers, the cutting of women's breasts, the gouging out of eyes and singeing of the hair, the back, the stomach by fire', Tola 1997, p. 151. See also Amnesty International, 1991a, pp. 9 *et seq*; Amnesty International 1991b, pp. 41–43; Amnesty International 1978, pp. 9–12.

To make the pain acute, the torturers first sliced the feet of the sole with a knife and let the wound fester for two days or so before start to beat on the wounds. In other cases, when the beating split the skin of the prisoner's feet, salt, and red pepper or urine were [*sic*] poured on the wound. The skull was also beaten by a sharp-edge ruler.¹⁸⁸

After long days of agony and suffering, many died during the ordeal. Those who managed to survive the torture were executed later *en masse*. A trifling number survived or escaped.¹⁸⁹

It was not uncommon for detainees to be selected for both physical and psychological torture.¹⁹⁰ Others were forced to watch while their cellmate was being tortured. The parents and residents of the *kebeles* in some cases were forced to watch their children or prisoners undergoing horrifying torture. The idea was to force the detainees and the community at large to inform the *Derg* on the EPRP members and sympathizers.

To use the words of Babile, 'exhibition of corpses' was another means to torture the relatives of the victim. Families of the victims who were not allowed to publicly mourn often had seen the bloodied and mutilated corpse thrown on the streets. In the majority of cases, a denunciatory placard was nailed on the corpses thrown on the street and on it was written a message: 'I was an anarchist' or; 'the Red Terror will be intensified.' In the evening the corpses were collected and dumped into mass graves dug by bulldozers. No parents could pick up the corpse of kin or offspring; no one was allowed to shed tears.¹⁹¹ Rather, they were coerced to chant: 'how happy it makes us to see anarchist blood flowing'.¹⁹² As Babile puts it, 'they (parents) suffered anguish for not being able to mourn or bury the dead, they suffered immensely as they trekked from *kebele* to *kebele* to search for their kin who may have been killed and thrown on the street.'¹⁹³ This act of terrorizing the masses by strewing the streets with corpses and mutilated bodies with the purpose to cow potential dissidents succeeded in silencing the populace.

One of the most horrific and inhumane peculiarities of the military junta was to sell corpses. The parents, who were lucky enough to find the corpses of their loved ones, often were forced to pay a price for the 'wasted bullet' to kill the 'anti-people' before they were allowed to take them. They were charged 100 US dollar per corpse.¹⁹⁴ The fee was called a 'bullet price'.¹⁹⁵

¹⁸⁸ Tola 1997, p. 150. Cf. Amnesty International 1978, pp. 9–12.

¹⁸⁹ See generally, Tola 1997, pp. 151–152.

¹⁹⁰ Tola 1997, p. 151. For a detailed account of the general use of torture to liquidate opponents, see generally Amnesty International 1991a, pp. 9 *et seq*; Amnesty International 1991b, pp. 41–43; Amnesty International 1978, pp. 9–12; De Waal 1991, pp. 101 *et seq*; Woldegiorgis 1989; Tadesse 2000; Taddise 2006; Zewde 2009.

¹⁹¹ Tola 1997, p. 154.

¹⁹² Tola 1997, pp. 154–155.

¹⁹³ Tola 1997, p. 155; Woldegiorgis 1989, p. 38. See also Amnesty International 1978, pp. 9–12; Amnesty International 1991b, pp. 41–43; the SPP Report 1994.

¹⁹⁴ Amnesty International 1991b, p. 7; Tola 1997, p. 155.

¹⁹⁵ Tola 1997, p. 155.

Generally, in the second phase of the Red Terror, the killing, arrests, and torture of the EPRP's prominent members and sympathizers continued widely. This phase was arguably the peak of the mass killings and arrests of alleged supporters or members of the EPRP. As stated above, in this phase the broad masses were empowered to take revolutionary measures against the dissidents. Accordingly, the *kebeles*, the revolutionary squads, and the kindred civilian allies of the *Derg*, carried out the cracking down on the EPRP by using different instruments of terror and oppression. In the eight bloody months, 3, 000 to 4, 000 people are estimated to have been killed in Addis Abeba alone.¹⁹⁶ An enormous number of people were arrested and tortured. It was only very few who survived the torture and escaped the *en masse* executions that followed on the torture.¹⁹⁷

2.4.2.3 Red Terror: Phase Three (November 1977 to mid-1978)

In the first two phases of the violent campaigns of terror, the main target was the EPRP members or perceived apologists. By the end of the second wave of the Red Terror, the Mengistu regime essentially had crushed the members and sympathizers of the EPRP in the cities. In the third phase of the terror, the EPRP disintegrated and had largely been destroyed. It was not in a position to hit back anymore. However, the attack on the remnants and sympathizers of the EPRP continued in an accelerated and intensified manner.¹⁹⁸ On the night of 16 December 1977, at least 300 were killed.¹⁹⁹ In the following few days, the defense squads killed about 25 alleged supporters of the EPRP. In this way, the EPRP was largely destroyed in the cities, and the remnants retreated to rural areas in the north. Those who went to the central highlands to fight against the *Derg* lost the battles against the *Derg* and the insurgents in the north, mainly the TPLF. As a result, the EPRP never really recuperated, thus losing its pre-eminence as an opposition group.²⁰⁰

¹⁹⁶ De Waal 1991, p. 104.

¹⁹⁷ Hiwot's description aptly sums up what happened during this phase of the terror: 'Ethiopia saw Satan rise up like a bolt of lightning from its belly in the shape of a man named Mengistu. He drew his sword against everybody and anybody committing one of the most heinous crimes in history. He plunged the country into mourning, tears, trepidation, and horror.' Hiwot 2012.

¹⁹⁸ Zewde 2009, p. 29.

¹⁹⁹ Tola 1997, p. 160. See also Zewde 2009, pp. 28–29.

²⁰⁰ De Waal 1991, p. 109. Cf Tola 1997; Tiruneh 1995. After the late 1970s liquidation process that the EPRP underwent because of the blow it had received from the *Derg* and the TPLF, the remnants of the party who fled to Sudan and other countries tried to resuscitate it. Apparently, it regained some sort of strength in the early 1980s. In 1984, they held a National Congress in the Northern part of Ethiopia, an area that was under its control. The EPRP lost the area under its control in the war with the TPLF in 1991. Following the removal of the *Derg* from power, the EPRP was excluded from the July 1991 conference. For more, see the EPRP website <http://www.eprp.com/about.html>. Accessed 9 June 2016.

In this phase, the Mengistu regime started its acts of terror against the *Derg*'s former ally, *MEISON*. As noted above, *MEISON* had willingly cooperated with the *Derg* in suppressing and wiping out its main political rival, the EPRP, in order to build its own base among the *kebeles*, peasant associations and other institutions.²⁰¹ It had initially managed to infiltrate into different institutions and received some prominence. Nonetheless, *MEISON*'s increasing dominance within different institutions created a strong threat to Mengistu's power. Hence, Mengistu started to purge *MEISON* members from different institutions who had become disloyal or who were in conflict with him. Many *MEISON* members were killed in this process of cleansing the *Derg* of what Mengistu labeled infiltrators.²⁰² Even if some *MEISON* leaders went underground, they were apprehended and executed; only a few survived or escaped the crackdown.²⁰³ For instance, Haile Fida, leader of *MEISON*, was apprehended and killed during the campaign of cracking down on *MEISON*.²⁰⁴ The *Derg* crushed *MEISON* in the same manner, it had the EPRP. *MEISON*, too, never recovered from the crackdown.²⁰⁵ As Beharu aptly describes it: 'Refusing to concert in life, the two organizations (EPRP and *MEISON*) were united in death.'²⁰⁶

In contradistinction to the first two phases, in which the terror was official and the *Derg* tried to justify the pervasive killings, as indispensable revolutionary measures against enemies of the people, in the third phase, the campaigns of liquidation of opponents were less public. Fewer corpses were littered on the streets. However, arrests and executions *en masse* continued in an intensified manner in different prisons and on the outskirts of cities. In Addis Abeba alone, during this phase at least 5,000 were killed.²⁰⁷ Amnesty International estimated that by end of 1978 about 30,000 political detainees were languishing in different prisons in Addis Abeba.²⁰⁸ Only a tiny survived the ordeal. Many were caused to 'disappear' and the details surrounding their disappearance are still unknown.²⁰⁹ As aptly observed by LeFort:

²⁰¹ Marcus 1994, p. 200.

²⁰² Zewde 2009, p. 29.

²⁰³ Marcus 1994, p. 201; Tola 1997, p. 22. Negede Gobeze (now Dr.), exiled in France, and Andargachew are among the few *MEISON* leaders who managed to escape the crackdown. See generally Ayele 2009b; Assegid 2000; Clapham 1988; Zewde 2002; Schwab 1985; Marcus 1994; Zewde 2009.

²⁰⁴ Ayele 2009b.

²⁰⁵ De Waal 1991, p. 109.

²⁰⁶ Zewde 2009, p. 29.

²⁰⁷ De Waal 1991, p. 104; Amnesty International 1978, p. 15.

²⁰⁸ Amnesty International 1978, p. 15.

²⁰⁹ For detailed discussions of the enormous number of victims whose whereabouts have not yet been revealed, see Amnesty International 1978; Tola 1997; Haile-Mariam 1998/99; and Amnesty International 1991a, pp. 6 *et seq*; Amnesty International 1991b, pp. 30–37. The case of the famous Ethiopian writer and journalist Bealu Girma, author of the renowned book *Oromay* (the End), is one of the few instances of disappeared detainees (enforced disappearance) in which the relatives

History offers few examples of revolutions that have devoured their own children with such viciousness and so much cruelty. It can be estimated that, of ten civilians who had actively worked for a radical transformation of Ethiopia, only one escaped arrest, imprisonment, torture, execution or assassination. The revolution swallowed the whole of the young generation of Ethiopian intellectuals, that is literates.²¹⁰

In summary, the three-phased Red Terror was characterized by the most hideous and unspeakable acts which took their toll on a large number of the young generation.²¹¹

2.5 Human Cost of the Terror: Quantification of the Victims

It has not been possible to establish the exact number of death tolls during the Red Terror. Understandably, it is difficult to cite accurate numbers. There is still an acrimonious debate raging around the issue of the number of victims of the Red Terror, as (some of) the killings took place in mass executions and/or in secret, not to mention the partisan involved in the estimation of the number of victims.

Some estimate that a minimum of 10,000 people were killed in Addis Abeba alone during the Red Terror.²¹² A comparable number of opponents or perceived opponents were executed in other different cities.²¹³ By the end of the Red Terror campaign, the death toll ran as high as 150,000 to 200,000, according to the Amnesty International estimation.²¹⁴ According to the report of certain human rights organizations, the *Derg* bears responsibility for the deaths of half a million

of the victims do not know how, where and when their loved one was killed. It is saddening to hear that some are clinging to a forlorn hope that the disappeared political detainees are alive and expect the return of their disappeared loved ones. As we will see in the following part, the transitional justice mechanism adopted by Ethiopia has not uncovered the deep root of the problems, the whole picture, and truth in a comprehensive manner. Even in cases in which the public at large knew what had happened to their loved ones, the acknowledgment part is missing. For more on Bealu, see Baalu Girma Foundation available at <http://www.baalugirmafoundation.org/bio.html>. Accessed 15 June 2016.

²¹⁰ Lefort 1983, p. 257.

²¹¹ Tola 1997; Tadesse 2000; Zewde 2009, pp. 17–32.

²¹² De Waal 1991, p. 109.

²¹³ For instance, Debre Markos, Gojjam, Dessie, Wollo and Kombolcha batches of political detainees were executed between 1976 and 1977. And in Gonder, Harerghe, Sidamo, and Bale 1, 713 were executed between 1 and 15 May 1977. For details, see De Waal 1991, p. 107–109.

²¹⁴ Aneme 2006, p. 66.

Ethiopians.²¹⁵ Whereas Kiflu, a former member of the EPRP, estimates that about 55,000 perished during the violent campaign of terror in Addis Abeba.²¹⁶ Babile states that in various prisons throughout the country there were no less than 250,000 prisoners.²¹⁷ Of this number, an estimated 30,000 were released.²¹⁸ He estimates the number of Red Terror victims to be close to 150,000.²¹⁹ These are just the victims who were allegedly killed during the official Red Terror over two years from 1977 to 1979. The total number of young educated Ethiopians that were murdered from the time *Derg* assumed power to early 1979 is as high as 250,000.²²⁰ Babile's estimate does not include those who perished during the famine as a result of government's manipulation of aid. According to Babile if one were to include those who were starved to death during the famine, about two million Ethiopians lost their lives between 1974 and 1991.²²¹ Mengistu, followed by Bereket, made the lowest estimate of the death toll. Mengistu put the number at no more than 2,000, whereas Bereket placed the figure at 5,000.²²² The variance has probably to do with the fact that mass executions took place secretly, especially during the last wave of the Red Terror, not to mention the bias involved in arriving at the estimation. All the estimations focus on the victims who were killed by the *Derg* regime. Those who were killed by the civilian and armed oppositions were mostly ignored. Besides, many of the victims who were tortured and illegally arrested by the Mengistu regime were not taken into account properly.

Regrettably, the Ethiopian government has not until now unravelled adequately the truth and perplexities surrounding the victims of the Red and White Terrors. So the huge variation in the estimates of the death tolls, ranging from 2,000 to 250,000, still linger and wait for an explanation. In other words, there is no official number of victims of the infamous Red Terror; admittedly, it is a tall order to know the actual number of victims of unimaginable atrocities like that of the Red Terror in Ethiopia. However, it would have been possible to come up with an official estimation of victims of the Red Terror had a proper mechanism been put in place. Given that relatives of the victims of the Red Terror including those who have been tortured and arrested arbitrarily were alive perhaps are still alive, they could have been used to come up with a closer estimation of the victims of the Red Terror. Sadly, this has

²¹⁵ De Waal 1991. This number of victims has gained currency and echoed by many including the Special Prosecutor Office of the Transitional Government of Ethiopia's Statement to UN Commission on Human Rights E/CN.4/1994/103 3 February 1994, p. 3 and by the Red Terror Martyrs Museum in Addis. However, the actual tally of the Red Terror victims remains far from clear.

²¹⁶ Tadesse 1998, p. 268.

²¹⁷ Tola 1997, p. 163.

²¹⁸ Tola 1997, p. 163. See Zewde 2009, p. 30.

²¹⁹ Tola 1997, p. 163.

²²⁰ Tola 1997, p. 163.

²²¹ Kissi 2004, pp. 115–133.

²²² Ayele 2009a, p. 198. Mengistu stated that 'to say the numbers [of victims] is 100,000 or 150,000, this is absolute lie', The New York Times 1994.

not happened yet; rather, Ethiopian officials preferred to quote Amnesty International's estimation.

As shown in Chap. 4 below, the accountability mechanism adopted by the Transitional Government of Ethiopia understandably does not show the 'correct' number of victims of the Red Terror, not to mention the victims of the White Terror. From a reading of the proceedings of the Red Terror trials, one can infer that *Derg* officials were held responsible for the killing of about 8,000 individuals. However, this does not reflect the actual number of victims. Those victims for whom the courts held the officials responsible are only the ones in respect of which the prosecutor has succeeded in proving his case beyond a reasonable doubt. Although it is possible to infer the minimum number of Red Terror victims from the judgments, it would be erroneous to try to equate the victims of the terror with the small numbers which the prosecutor proved for the sake of establishing criminal liability. Thus, the quantification of Red Terror victims regrettably remains a contested point. But what cannot be denied is that the estimation by Mengistu and his ilk trivialized the numbers and dehumanized the victims, if not a failure to show remorse.

As stated above, in each the Red Terror phases an estimated 2,000 to 5,000 people perished. By going from what is known to the unknown, and making a cursory perusal of what has been mentioned above, Amnesty International's estimate represents the minimum number of victims of political killings in Addis Abeba alone. However, this number does not include those who were killed before the official terror. It bears noting here that the savage killings or the Red Terror violence were not limited to Addis Abeba alone; it was replicated across the country in places like Jimma, Dire Dawa, Tigray, Bale, Gondar, and Sidama.²²³ What should not be overlooked, too, is the number of victims who were killed in Addis Abeba and other cities between the end of the last phase of the terror and the last day of rule by the military *junta*. In other words, though the official intensive Red Terror violations of human rights ended in mid-1978, the torture, arrest, and other small-scale killings continued until the last day of the military regime.²²⁴ By taking into account all those factors, probably the figures of the victims of the Red Terror in Addis Abeba alone would surpass the cautious minimum estimation made by Amnesty International.

The difference in the estimations also applies to the number of victims of vicious torture, arbitrary arrests and enforced disappearances at the hands of the *Derg* regime during the official violent campaign and thereafter. By the end of 1978, approximately 400,000 political detainees were in prison.²²⁵ Generally, the number of Ethiopians who were executed, arrested, disappeared, detained and tortured in

²²³ See De Waal 1991, pp. 106–108; Amnesty International 1991b; Tola 1997; Tiruneh 1995; Clapham 1988; Zewde 2002.

²²⁴ See generally Tola 1997; De Waal 1991; Aneme 2006, pp. 64–83; Zewde 2009; Amnesty International 1991b; Amnesty International 1978; Amnesty International 1991a; De Waal 1991; Human Rights Watch 1994.

²²⁵ See generally Amnesty International 1991b.

appalling prison conditions is unknown. What is clear at the end of the terror is that the Mengistu regime by using state-sponsored mass murder, arbitrary arrests, torture and other sundry instruments of terror turned the country into ‘killing fields’ and thoroughly crushed the civilian opponents.

By mid-1978, Mengistu had ridden all the cities of his opponents. Nevertheless, the terror continued until the last day of the military junta, no matter how small. The Red Terror as illuminated above was not an oddity or isolated incident, rather it was state-sponsored havoc of liquidating opponents, which colored the roads in different cities and towns red. The three Red Terror phases are not comparable to the pre-1976 and post-1978 terror in terms of intensity and quantity. Other than that, the Mengistu regime resorted to terror from the outset and the terror ruled until the last day of Mengistu’s reign.

2.6 The War against the Insurgents in the North

When Mengistu assumed power, the country was engulfed in many crises. Put simply, many exogenous and endogenous threats to the power of Mengistu were hovering around. Most of the problems originated during the days of the imperial regime. The urban civilian opposition constituted a major internal threat to Mengistu’s power. But, by the end of 1978, he had crushed all civilian opposition. One of the external problems was the external aggression coming from Somalia, with the support of the US, which wanted to establish a military base at Barbara. The invasion of Somalia was repelled and the Said Barre regime suffered a devastating defeat.²²⁶ However, the continuing insurgencies in Eritrea and Tigray remained as an endogenous threat to Mengistu’s power consolidation.

Mengistu, akin to his predecessor, but quite contrary to the proposal of some *Derg* members, resorted to armed force to solve the problem with the insurgents. The first two chairmen of the *Derg* and a few *Derg* members advocated for a compromise with the Eritrean Front. They specifically stated that war had never solved the Eritrean problem, so negotiation was the only way to solve the secessionist policy of the insurgents on a long-term basis. However, Mengistu, the emerging strong man, resorted to armed force to solve the Eritrean problem.

The Eritrean People’s Liberation Front was the dominant pro-secessionist insurgent group from Eritrea that predates the *Derg*.²²⁷ It was claiming, and fighting for, political self-determination and the secession of Eritrea. The other insurgent in the northern part of the country was the Tigray People Liberation Front, which initially fought for the independence of the Tigray province.

²²⁶ See generally Tarek 2000, pp. 635–667; Tiruneh 1995; Zewde 2002; Schwab 1985; Marcus 1994.

²²⁷ Tareke 2002, pp. 465–498; De Waal 1991; Zewde 2002; Reta 2000; Tibebu 1995.

The Eritrean question was an old one which predated the coming into power of the military junta. Eritrea was an Italian colony for about half a century. After the end of the Second World War, it came under British rule. In 1952, with the involvement of the UN, Eritrea formed a federation with Ethiopia.²²⁸ The federation, which was a kind of forced marriage, did not last. Haile Selassie stripped the Eritrean administration of its power and reduced it to one of the then administrative regions. This sowed the seeds for the crisis.

The Eritreans started to organize themselves under different movements, like the Eritrean Liberation Front (ELF) and the Eritrean People Liberation Front (EPLF). The pro-secessionist Eritreans established the Eritrean Liberation Front in 1961.²²⁹ Most of the members and founders of the Eritrean Liberation Front were Muslims. Some members, who had defected from the Eritrean Liberation Front, established the other insurgent group in Eritrea, the Eritrean People Liberation Front, in 1972. Issayas Afeworki, the President of Eritrea since independence, was one of the founders and leaders of this Front.²³⁰

The Ethiopian imperial regime carried out several military sorties against the Eritrean Fronts. For instance, in 1965, the government army launched three offensive attacks to crush the Fronts. In those three attacks, which took place in different places in Eritrea, over 62 villages were burnt, many civilians were killed, and crops, livestock, and property destroyed.²³¹ One of the counter-insurgency measures was to relocate people to fortified villages.²³² However, this did not help the imperial regime to crackdown on the rebel groups; instead, it precipitated the demise of Haile Selassie's regime. After the Mengistu regime came into power by dethroning the Emperor, one of the problems that the inexperienced low ranking officers confronted was the Eritrea question. Aman, as a chairman of the *Derg*, preferred to resolve this long-standing problem through negotiating with the Fronts. Nonetheless, Mengistu and other *Derg* members fiercely opposed Aman's proposal. They resorted to armed force to solve the Eritrean problem.

Due to the escalating political and tactical differences between them, the two pro-Eritrean independence Fronts engaged in an internecine war which resulted in many casualties.²³³ However, the two Fronts decided to settle their difference by negotiation and reached agreement in 1975. The two fronts then launched a concerted war against the Ethiopian government army. The Fronts controlled most parts of Eritrea, while at the time Mengistu was being occupied and kept busy by the urban opposition and the invasion from Somalia. Between 1975 and 1977, the

²²⁸ Zewde 2002; Reta 2000.

²²⁹ See generally Zewde 2002; Reta 2000.

²³⁰ Zewde 2002.

²³¹ De Waal 1991, p. 43

²³² De Waal 1991, p. 43. See also Zewde 2002; Reta 2000; James et al. 2002; Erlich 1983, p. 39; Tareke 1991; Woldegiorgis 1989; Henze 2000; Tibebe 1995.

²³³ Erlich 1983, pp. 38 *et seq*; De Waal 1991, pp. 41–42.

Fronts had gained control of many parts of Eritrea, except Massawa and the capital city, Asmara.²³⁴

The EPLF started to storm Massawa with the aim to control Eritrea fully.²³⁵ The TPLF, which was established in 1975 by a group of left-wing students, started a war against Mengistu's army in different parts of Tigray.²³⁶ The TPLF was fighting for self-determination of the Tigray people. This Front was later headed by the late Prime Minister, Melese Zenawi. Those different ethnic-based Fronts continued their offensive attacks in different parts of northern Ethiopia.

The Ethiopian government launched a war and diverse offensive campaigns to crush the insurgents. These included air bombardments of open markets and villages, attacks on relief aid, forced relocation of civilians, attacks on civilians and civilian objects, the creation of famine, and control of the economic life of the people.²³⁷ The insurgents also carried out several offensive attacks and perpetrated gross human rights violations. For instance, the ELF executed many Christians. Furthermore, the insurgents carried out extra-judicial killings of 'collaborators' of the Ethiopian regime. The war—armed conflict—between different ethnic-based insurgents and Mengistu's army continued for 17 years. The myriad of atrocities that were committed in these 17 years of war are elaborated below.

2.6.1 *Indiscriminate Bombardments*

The Mengistu regime carried out repeated air raids on rebel held or sympathizing areas. The army used over 100 bomber planes, including the sophisticated MIG23.²³⁸ It also used several deadly weapons like phosphorous and cluster bombs.²³⁹ Air bombardments were carried out because of the mountainous nature of the Ethiopian landscape in the north. The insurgents had neither aircraft nor sufficient anti-air craft artillery. This placed the government forces at an advantage. Hence, the government repeatedly bombarded the rebel controlled areas or rebel sympathizing areas. The aim of aerial bombardments was to discourage civilians from supporting the rebels. Furthermore, they aimed to deter the insurgents from capturing towns for fear that they would be offensively counter-attacked and destroyed.

²³⁴ De Waal 1991, p. 48; Tarek 1991.

²³⁵ De Waal 1991.

²³⁶ See generally Young 1998; Clapham 1988; Zewde 2002; Schwab 1985; Marcus 1994; Markakis 1987; Woldegiorgis 1989; Tarek 1991; Chege 1979, pp. 359–380; Markakis and Ayele 1977, pp. 99–108; Clapham 1988.

²³⁷ De Waal 1991, pp. 112–113.

²³⁸ De Waal 1991, pp. 112 *et seq.*

²³⁹ There is also an unsubstantiated allegation that a chemical weapon was also used by the Mengistu regime, see De Waal 1991; Human Rights Watch 1990a, b.

In March 1976, with the aim to crush the secessionist fronts in Eritrea once and for all, the government deployed over 50,000 troops with an enormous amount of deadly armour.²⁴⁰ They bombed indiscriminately. The outnumbered EPLF retaliated by using different tactics against the untrained soldiers of Mengistu. Many died in the war. An estimated number of 20,000 people were killed.²⁴¹

One of the Fronts in Eritrea, the ELF, was considerably weakened after the attacks by the Mengistu army. Political differences and conflicts started to emerge again between the two allied Fronts, and this later led to an irreversible split. With the help of the TPLF, the EPLF crushed the weakened ELF. The ELF retreated to Sudan where it was dismantled and disarmed.²⁴² The EPLF and TPLF joined forces, and continued their attacks with more intensity inflicting losses on the government army in various areas.

The government responded to the insurgents with unparalleled, indiscriminate brutality by way of air raids. In the early 1980s, the government launched a 'Red star campaign' against the insurgent in Eritrea.²⁴³ The massive military campaign was aimed at driving the EPLF out of the Sahil district in the Nakfa region where the group had ensconced itself. The Ethiopian government used untrained peasants who were promised land as a reward for their effort. But the disciplined EPLF, though outnumbered by the Mengistu army, made short shrift of the government's troops and scored a victory. About 11,000 soldiers were killed.²⁴⁴ The EPLF continued to advance into different parts of Eritrea. The government still maintained strategic control over different areas in Eritrea and Tigray, continuing its counter-insurgency measures against the rebels.

The indiscriminate air raids on the residential areas of the commercial town of Massawa resulted in casualties in which over 100 civilians were killed and many wounded, and their property destroyed.²⁴⁵ After this offensive attack, the EPLF captured the port of Massawa in February 1988, which is regarded as the 'Pearl of the Red Sea'. With the rebels in control of Massawa, the government pursued a policy to turn the "‘pearl of the red sea’ into a mere piece of grit",²⁴⁶ but to no avail. The Government's bomber aircraft carried out many air-raids, one of which targeted the warehouse in which about 50,000 metric tons of US-donated food aid were stored, and destroyed them.²⁴⁷

²⁴⁰ De Waal 1991. See generally Young 1998; Clapham 1988; Marcus 1994; Woldegiorgis 1989; Tarek 1991; Henze 2000; Harbeson 1988; Markakis 1987; Tareke 2002, pp. 465–549.

²⁴¹ De Waal 1991, p. 114; Clapham 1988.

²⁴² De Waal 1991, p. 116; Amnesty International 1991b, p. 47. See generally Haile-Selassie 1997; Tibebu 1995; Zewde 2002; Marcus 1994; Henze 2000.

²⁴³ Marcus 1994, p. 202.

²⁴⁴ Marcus 1994, pp. 202–203. See also Tiruneh 1995; Clapham 1988; Zewde 2002; Schwab 1985.

²⁴⁵ Human Rights Watch 1990c; Human Rights Watch 1990b, p. 4. See also Marcus 1994, pp. 202–203; Tarek 2002, pp. 465–498; De Waal 1991; Woldegiorgis 1989.

²⁴⁶ Human Rights Watch 1990c, p. 5.

²⁴⁷ Human Rights Watch 1990c, p. 5.

The government continued its fight against the TPLF in different parts of Tigray. But the TPLF used guerrilla tactics to stay in control of most parts of Tigray. Since at the time the government was preoccupied with the Ogaden and other problems, the TPLF made significant advances into different parts of Tigray. Even though the TPLF was not fully armed, it had a core army of an estimated 7,000 to 15,000 in 1986,²⁴⁸ with comparable number of militia. Red Terror brutalities drove the urban and rural population to support or join the rebels. The enormous support of the populace helped the TPLF to achieve victory over the Mengistu army.

To counter the growing dominance and advance of the TPLF, the government used different counter-insurgency strategies, such as counter-population warfare, to destroy the TPLF which was moving among the Tigray population. Its tactic was clearly meant to 'drain the sea to catch or kill the fish', hence, the repeated aerial bombardments of the markets and trade areas in Tigray, burning of villages, and other large-scale indiscriminate military actions.²⁴⁹

The government's use of large-scale counter-insurgency strategies weakened the TPLF significantly, forcing it to retreat to areas it had captured. But with increasing support from the rural population aggrieved by the government's use of famine as a weapon of war, the Front picked up strength again.²⁵⁰ As a result, the number of TPLF troops increased by dozens. Many volunteers joined the Front. The TPLF started to hit back, inflicting defeats on the government forces in different parts of Tigray. By the end of 1987, the Front had captured various places in Tigray and had destroyed many garrisons of the Mengistu army. The government reacted with indiscriminate bombardments of open-day market in the city of Hawzen. This was one of the worst indiscriminate attacks against civilians and civilian objects.

On the day of the attacks, thousands of people had gathered in the market of Hawzen to trade with their animals, salt, coffee, grains, and other goods.²⁵¹ The people came from rebel-held as well as government-held areas. Simply, the market-goers were as diverse as the commodities in the market. The aircraft, such as MiGs, encircled the market on 22 June 1988, firing at the thousands of market-goers.²⁵² Hawzen was yet to fall under the control of the rebels. The aerial bombing was aimed at terrorizing the civilians and demoralizing the sympathizers of the rebels. In these indiscriminate aerial bombardments, approximately 2,500 market-goers were killed,²⁵³ with a huge number severely wounded and traumatized. Much property was destroyed. The unique and co-ordinated nature of the bombing of Hawzen has been described as a systematic attack which

²⁴⁸ See generally De Waal 1991, pp. 205 *et seq.*

²⁴⁹ De Waal 1991, pp. 136–139. See also Young 1998; Marcus 1994.

²⁵⁰ De Waal 1991, pp. 205–206.

²⁵¹ The SPP Report 1994, p. 3; De Waal 1991, pp. 201–206.

²⁵² The SPP Report 1994, p. 3. Cf Young 1998; Marcus 1994; De Waal 1991; Human Rights Watch 1990b.

²⁵³ The SPP Report 1994, p. 3.

required careful planning to arrange for a succession of MiGs and helicopters to be present at Hausien, far away from the nearest airfield, in coordinated shifts throughout an entire day. Visitors to the ruined market town have commented that, in the tragic catalogue of Guernica, Coventry, Dresden, and Hiroshima, a place also belongs to Hausien.²⁵⁴

This was one of the most heinous violations of humanitarian law by the Mengistu army. Since Hawzen was under government control at the time of the air raids, and the market goes apparently came from different areas, the indiscriminate aerial bombardments aim was not very clear.²⁵⁵

The war continued until early 1991. The rebels controlled almost all parts of their respective areas (the TPLF captured most of Tigray and the EPLF also controlled Eritrea) in the late 1980s. While the rebel groups continued to inflict defeat, the indiscriminate air raids by the Mengistu army continued in different places, like Wollo and Shewa.

2.6.2 *Creation of Famine and Manipulation of Aid*

Famine was not a new phenomenon; rather, it was a recurrent problem in Ethiopian history. The country had been hit by devastating famine during the last years of the Haile Selassie regime.²⁵⁶ In the early 1980s, the northern part of Ethiopia was again affected by the most devastating famine. Traditionally, the Ethiopian people tried to cope with the famine by migrating from drought affected areas to less populated areas, which were not affected by the drought. Traders also play a significant role in reducing the deleterious effects of famine by providing basic goods from surplus areas. Foreign aid agencies also help to reduce the devastating effect of famine. Nevertheless, during the *Derg* rule, the traditional means of coping with famine were severely restricted and used as means of warfare.²⁵⁷ Surplus grains were confiscated and diverted to the regime's armies. Furthermore, '[t]he government also directly manipulated famine relief as an element in counterinsurgency, channelling food aid to the military and to secure areas, and blocking relief to areas it did not control.'²⁵⁸ The Mengistu regime thus turned the drought into a devastating famine.

²⁵⁴ Human Rights Watch 1990b, p. 23.

²⁵⁵ In explaining the reason why Hawzen was chosen, African Watch stated that 'Hausien was probably selected as a target because, not being in a rebel-controlled area, the market still met during daylight, and there were no TPLF fighters in the area with anti-aircraft artillery to make an attack dangerous.' Human Rights Watch 1990b, p. 24. See also De Waal 1991; Young 1998; Marcus 1994.

²⁵⁶ See generally Peter 2010; Wolde-Mariam 1986; Tiruneh 1995; Clapham 1988; Zewde 2002; Schwab 1985; Marcus 1994; Clapham 1969; Woldgiorgis 1989; De Waal 1991; Legum 1975; Pankhurst 1985.

²⁵⁷ Human Rights Watch 1994, p. 8.

²⁵⁸ Human Rights Watch 1994, 1991, p. 8.

In addition, the indiscriminate air raids by the Mengistu regime instilled fear and terror that in turn, disrupted all commerce and other activities in Eritrea and Tigray.²⁵⁹ Because of the aerial bombardment of open daylight markets, civilians were forced to change the daylight markets to night markets. This aggravated the effect of the drought by preventing people from getting commodities. Markets in the towns and villages are the cornerstones of the economic life of the people. Usually, farmers whose harvests fail sell their livestock and buy grains from the open daylight markets. By targeting the open daylight market, the *Derg* successfully destroyed the crucial economic life of the civilians.

The attack on food relief was also another factor which aggravated the effect of the famine. The government bombarded food stores in the rebel-held areas.²⁶⁰ Furthermore, the deliveries of relief aid by humanitarian organization, mainly to the rebel held areas, were targeted by Mengistu's army.²⁶¹ In other words, inhibiting food and other humanitarian assistance from reaching the rebel-controlled areas or areas believed to be sympathetic to the rebels was turned into one means of conducting war. This was done with the aim to halt the delivery of food aid and other assistance, to empty the rebel-held areas, and to isolate the rebels from the public.

The famine was used as a strategic weapon against rebel-held areas to depopulate them and to alienate the rebels who were allegedly moving among the people. Between 1980 and 1984, during the famine, an estimated 500,000 people died. Of this number, over 100,000 of the deaths were attributed to the government.²⁶²

2.6.3 *Forced Resettlement*

As part of the famine relief program, in October 1984, the government launched a resettlement plan. The resettlement plan was to move about 1.5 million people from the north to the less-populated south. About 600,000 people were in fact relocated in three phases of the resettlement program, between November 1984 and March 1988.²⁶³ Though the official justification for the resettlement was that it was a famine relief measure it was widely believed that the hidden motive was, in fact, a counter-insurgency strategy of the regime and the central aspect of the policy of 'draining the lake to catch or kill the fish.'²⁶⁴ The resettlement program was conducted mainly in areas populated by rebel sympathizing. The policy of forced relocation was carried out with bad and overcrowded modes of transportation. The

²⁵⁹ See generally Marcus 1994; De Waal 1991.

²⁶⁰ Human Rights Watch 1990b, pp. 3–4. See generally Human Rights Watch 1991a, 1990a; De Waal 1991.

²⁶¹ Human Rights Watch 1990b, pp. 12–23.

²⁶² De Waal 1991, p. 172. See also Human Rights Watch 1991a, 1990a.

²⁶³ The SPP Report 1994, p. 3; and De Waal 1991, p. 210.

²⁶⁴ De Waal 1991, p. 210.

government used forced resettlement or villagisation as a means to isolate and destroy the insurgents from the people.²⁶⁵ The rural people wittingly, or in some cases under duress had helped the rebels in many ways, such as providing them with shelter, food, and intelligence. By way of forced relocation under the euphemism of ‘relief program’, the government aimed to separate the rebels from the society, and in effect deny the rebels access to food, shelter, and information. Generally, many regarded the forced relocation as a brutal counter-insurgency method used by the government. The human cost of the resettlement ranges from 50,000 to 100,000.²⁶⁶

Despite the horrific counter-insurgency action of the Mengistu army, the EPLF and TPLF continued to march to the southern part of the country. The EPLF controlled all parts of Eritrea in the late 1980s. In 1989, the EPRDF was formed by the TPLF, Ethiopian People Democratic Movement, Oromo People Democratic Union and other ethnic-based Fronts to seek the removal of the *Derg* regime. The TPLF/EPRDF captured all parts of Tigray in February 1989.²⁶⁷ The TPLF/EPRDF constantly advanced to the south and controlled cities like Waldiya, Dessie, Northern Shewa, and Debre Tabor while the government army retreated. The retreating army of Mengistu caused widespread destruction of cities, like the electricity generating station in Mekelle.²⁶⁸ The EPRDF often behaved decently after capturing a city, but in some cases, civilians were killed or abused by the ill-disciplined soldiers.²⁶⁹ The TPLF/EPRDF continued to advance to Addis Ababa.

2.7 The Demise of the Mengistu Regime and the Rise to Power of the Ethnic-based Insurgents

President Mengistu had not only built one of the largest armies in Africa but also had always vowed and boasted that he would fight until one soldier and one bullet remained. This repeated statement of his made the soldiers loyal to him, and they were ready to fight to the end. Following a swift advance of TPLF/EPRDF forces to Addis Ababa, on 20 May 1991, Mengistu, contrary to the expectations of many, clandestinely fled to Zimbabwe. With his unexpected departure, a significant part of his army (close to 45,000) fell into disarray. Many soldiers returned to their homes. Others fled to Djibouti. In sum, after Mengistu disappeared, the army melted away

²⁶⁵ De Waal 1991, p. 210.

²⁶⁶ The SPP Report 1994, p. 3; De Waal 1991, p. 221.

²⁶⁷ See generally, De Waal 1991, pp. 253–255; Amnesty International 1991b, p. 9; Zewde 2002; Schwab 1985; Marcus 1994; Young 1998.

²⁶⁸ De Waal 1991, pp. 260–261.

²⁶⁹ De Waal 1991, pp. 266–277.

and disintegrated. The EPRDF advanced to Addis Ababa without significant resistance and surrounded the city.²⁷⁰

To avoid unnecessary casualties, the international community urged the Fronts not to launch attacks on the city. After Mengistu fled to Zimbabwe, Lieutenant General Tesfaye Gebre Kidan was appointed as the interim Acting President. The interim President was negotiating with the Fronts in the US-convened peace talks in London. However, the peace talks failed because of the withdrawal of the representative of the EPRDF from the negotiations.²⁷¹

Finally, after 17 years of war, with virtually no resistance from the demoralized army, the EPRDF, which has since been ruling the country, captured Addis Ababa on 28 May 1991. The EPRDF established the Transitional Government to pave the way for a democratically elected government. Eritrea became an independent State by way of a controversial ‘referendum’ arranged by the Transitional Government.

About 1,900 *Derg* officials, including the Interim President, the Prime Minister, Foreign Affairs Minister, members of security forces, commanders, and other higher *Derg* officials were arrested at the time the EPRDF assumed control over the country. Ethiopians had expectations that the Transitional Government would address the horrific human rights violation, that it would place human rights on top of its agenda for the future, and that it would offer respite and hope to people who had lost their loved ones and suffered so much in one way or another. The question as to how the Ethiopian government addressed these concerns will be explained in the next Chapter.

2.8 Interim Conclusion

The *Derg*, a military *junta* that toppled the aristocratic feudal monarchy, ruled the country for 17-year. From its early years, the *Derg* perpetrated egregious human rights violations. Red Terror, a liquidation of political opponents, was declared as an official means of dealing with adversaries. The Red Terror came in three waves. During these phases of the Terror, the Mengistu regime perpetrated egregious human rights violations of various forms, such as, political killings, *en masse* executions of opponents, arbitrary arrests, vicious torture, and enforced disappearances.

The opponents’, primarily the EPRP, carried out sporadic campaigns of assassination, called the White Terror, against *Derg* members, supporters, and movements allied with the *Derg*. For 17 years, terror and impunity reigned in the country. The human cost of the terror, however, remains debatable. After a long civil war, the ethnic-based Fronts toppled the Mengistu regime in May 1991.

²⁷⁰ See Tiruneh 1995; Zewde 2002; Young 1998; Marcus 1994; De Waal 1991.

²⁷¹ Amnesty International 1991b, pp. 9–10.

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Chapter 3

The Ethiopian Legal Framework for the Prosecution of Crimes Under International Law



Abstract Criminal accountability as one of the transitional justice mechanisms should be conducted without violating the principle of legality and the fair trial rights of the accused. This presupposes the existence of comprehensive laws at the time the crimes were allegedly committed which incorporate and define the crimes clearly. This chapter analyzes whether Ethiopia had in place an adequate normative infrastructure when embarking on the extensive prosecutions of *Derg* officials. To do so the chapter deals with the legal regime of Ethiopia for the prosecution of crimes under international law for which *Derg* officials and other individuals were prosecuted (or should have been prosecuted).

Keywords Politicide • Genocide • Protected groups • Political group • Crimes against humanity • War crimes • Modes of liability • Defense

3.1 Introductory Remarks: Setting the Framework

In a 17-year-long brutal reign which was rationalized as a system for maintaining peace and security, the Mengistu dictatorship was responsible for the most horrendous human rights violations in the history of Ethiopia. Mengistu's rule left scars and wounds that definitely will take time to heal. The post-Mengistu government, nevertheless, needed to start the healing process by giving effect to the quest of victims for justice and historical reckoning. Therefore, after ousting the bloody Mengistu regime, the newly installed government of the late Melese Zenawi

decided to address the *Derg* crimes mainly by bringing the perpetrators to account, a classic example of retributive justice.¹ From the array of transitional justice mechanisms, such as, prosecution, revamp, conditional amnesty, and reparation, Ethiopia opted for extensive investigation and prosecution of the systematic crimes of the *Derg*.

One of the formidable challenges facing states undergoing political transition, like the Transitional Government of Ethiopia and many other countries over the past 30 years, is a lack of adequate normative frameworks criminalizing egregious human rights violations perpetrated by the predecessor dictatorial regime or committed during an armed conflict.² This is mainly so because prosecution as a means to ending a culture of impunity and restoring the rule of law should be ensured without violating the principle of legality and the fair trial rights of the accused. This presumes the existence of comprehensive laws at the time the crimes were allegedly committed which incorporate and define the crimes clearly.³ This chapter deals with the normative framework of Ethiopia for the prosecution of crimes under international law for which former officials were prosecuted. The chapter explores also if there were any legal barriers that (could have) stood in the way of holding the alleged perpetrators criminally accountable.

¹ For the analysis of the prosecution of *Derg* crimes, see *infra* Sect. 5.2.

² More so, when the transitioning state opts to prosecute the serious violations that had been committed as crimes under international law *per se*.

³ The absence of domestic laws which criminalize *jus cogens* crimes at the time of commission does not necessarily preclude the prosecution of the crimes before the courts of the state of commission or by other states. Theoretically, the state can retroactively confer on the court retroactive jurisdiction over core crimes and it may successfully prosecute the perpetrators without violating the notion of non-retroactivity of substantive criminal law. This is so because core crimes have attained the status of customary international law. The principle of non-retroactivity does not apply when the crimes in question are already criminalized under international law. Several international human rights law instruments and the practice of regional human rights courts also confirm the exception to the principle of legality/non-retroactivity. See Article 15 of UN 1966, and Article 11(2) Universal Declaration of Human Rights (UDHR). For more, see Articles 57 and 64 Vienna Convention on the Law of Treaties, Court of Justice of the Economic Community of States of West Africa, *Hissène Habré v. Republic of Senegal*, Judgement, ECW/CCJ/JUD/06/10, 18 November 2010, paras 28 *et seq.* See also the decision of the European Court of Human Rights (ECHRts) which ruled that the conviction for political genocide under the new Criminal Code of Lithuania is a violation of the prohibition of retroactive application of law. European Court of Human Rights, *Vasiliauskas v Lithuania*, Judgement, ECHRts Application no. 35343/05 (2015), paras 169 *et seq.* and Milanovic, M 'European Court Tackles the Definition of Genocide', EJIL: Talks (2015) available at <http://www.ejiltalk.org/european-court-tackles-the-definition-of-genocide/>. Accessed 16 June 2016.

3.2 A Brief Survey of the Regulation of Core Crimes Under Ethiopian Law

In order to regulate the complexities of modern life, Ethiopia enacted its first Penal Code in 1930.⁴ Prior to 1930, the *Fetha Negest* (Glory of Kings) regulated all forms of social life and activities in Ethiopia, including a few criminal matters.⁵ The Penal Code of 1930 represented the first consistent endeavor to unify and systematize the Ethiopian traditions in criminal matters.⁶ Although this Penal Code marked a giant step forward in the codification of the Ethiopian criminal law, it fell short of regulating not only conduct that amounted to crimes under international law but also conduct constituting ordinary crimes. The Penal Code was also deficient in matters, such as criminal responsibility and other core principles of criminal law.

Three decades later the 1930 Penal Code was rescinded and replaced by another, relatively modern code, namely, the Penal Code of 1957. The latter was part of the vast codification processes that took place in Ethiopia during the 1950s and 1960s.⁷ The 1957 Penal Code followed the so-called bi-partite classification of offences which permits the enunciation of the principles applicable to all offences, general principles, regardless of the punishment they carry or the court before which they are triable. The Code dealt with both serious offences (Articles 1–689) and petty offences (Articles 689–820). The provisions concerning serious offences were categorized into a general part, which set out the general principles, such as, modes of liability, general *mens rea* and other principles common to all serious offences; as well as a special part, which described the various (contextual) elements constituting the respective crimes and penalties applicable. Petty offences were subdivided similarly. However, this chapter focuses mainly on the special part of the Code, and specifically on the parts dealing with core crimes, on the basis of which *Derg* officials were prosecuted.

The 1957 Penal Code was later repealed by the 2004 Criminal Code of the FDRE.⁸ The new Criminal Code retained, in essence, all the provisions regulating core crimes under the previous Penal Code, without significant modification.⁹ The

⁴ The Penal Code of 1930.

⁵ See generally Sedler 1967–1968, pp. 562–635; Graven 1965; Fisher 1971, pp. 709–746; Singer 1970, pp. 73–125; Jembare 2000.

⁶ See Jembare 2000; Graven 1965.

⁷ The Penal Code of Ethiopia 1957. Hereinafter ‘the Penal Code’ or ‘the Code’.

⁸ The Criminal Code of the of Ethiopia 2004. Hereinafter ‘the Criminal Code’.

⁹ Compare Articles 281 through 295 of Penal Code with Articles 269 through 283 of the Criminal Code.

discussion below deals primarily with the core crimes,¹⁰ namely genocide, crimes against humanity and war crimes, as enshrined and defined under the 1957 Penal Code, as this Code was the legal basis for the prosecution of *Derg* officials. However, reference will also be made to the 2004 Criminal Code to indicate the modification it introduced.¹¹

3.3 International Crimes Under the 1957 Penal Code

The 1957 Penal Code devoted one chapter containing 14 articles for crimes under international law at a time when many states had no comprehensive codified laws on these crimes.¹² Ethiopia was ahead of its time in this respect, albeit this is not in and of itself a *tour de force*.¹³ The Special Part of the Penal Code in Book II, Title II, Chap. 1, entitled '*crimes against laws of nations*' encapsulated core crimes as '*fundamental offences*' punishable under Ethiopian legal jurisprudence. Under the 2004 Criminal Code, the caption of this specific part was changed to '*crimes in violation of international law*.'¹⁴ The Penal Code included the core crimes of genocide and war crimes.¹⁵ Each of these crimes will be discussed in detail below.

3.3.1 Genocide

The crime of genocide, as we know it today, is a creature of international criminal law treaties. Prior to the adoption of the Genocide Convention, national laws did

¹⁰ In this book, core crimes, *jus cogens* crimes and crimes under international law are used interchangeably to refer to crime of genocide, war crimes and crimes against humanity. However, this is not to say that core crimes are limited only to these three crimes. For detailed discussions on the labeling of the crimes under international law (or truly international crimes), and transnational crimes, see generally, Werle and Jessberger 2014, pp. 30–31; Bassiouni 2013; Cassese 2013, pp. 18–21; Ambos 2013, pp. 54–56; Obura 2011; Bassiouni 1996a, b; Einarsen 2012, pp. 135 *et seq.*

¹¹ Highlighting the modification made by the new Criminal Code is necessary because the Federal High Court applied the new Code in meting out punishment.

¹² Articles 181–295 of the Penal Code.

¹³ The plausible reasons for including the core crimes under the Penal Code at that time were that: (1) it was part of the massive codification and law modernizing processes that the country was undergoing; and (2) the great danger that the country had experienced during the horrific attack on Ethiopians, mainly civilians, by Graziani after an attempted killing of the latter by two Ethiopians in 1933. The horrific attacks on Ethiopians showed the necessity to have legal frameworks criminalizing crimes under international law. On the horrendous attacks on Ethiopians by the fascist rule, see Campbell 2017.

¹⁴ Criminal Code Book III, Title II. In the author's opinion, the caption is vague if not broad.

¹⁵ Crime of aggression was also included albeit not in the same label and scope. See Sayapin 2014, pp. 210, 221.

not know this crime, at least not as it is presently labeled or characterized. It was only after the adoption of the UN Genocide Convention that the vast majority of states criminalized the crime of genocide under their respective domestic laws.¹⁶ Accordingly, before considering in detail the crime of genocide under the Ethiopian Penal Code, it is necessary to make a cursory perusal of the etymology, and legal definition of genocide at the international level as it was the bedrock and the main impetus for the incorporation of the crime under domestic laws of states, Ethiopia included.

3.3.1.1 General Overview of Genocide Under International Law

Before dealing with the genocide provision under Ethiopian law it is judicious to make a short *tour d'horizon*, highlighting the scope of the crime of genocide under international law and showing the readily apparent influence this had in the criminalization of genocide at the national level.

Historical Background and the Etymology of Genocide

Although grave acts that aimed at obliterating entire groups of people are as old as human-kind, the word genocide as such was not heard of nor used to encapsulate the offence until 1944.¹⁷ It was coined by the Polish-Jewish lawyer, Raphael Lemkin,¹⁸ to describe the unspeakable atrocities committed by the Nazis against the Jews and Gypsies (the Romani or Roman people).¹⁹ Before Lemkin used the term to describe the Shoah, which means the Holocaust, the atrocities committed against the Jewish people was called by some a 'crime without a name.'²⁰ Etymologically, the word 'genocide' originated from the Greek word '*genos*' meaning race, nation

¹⁶ Shany 2009, pp. 4–25; Werle and Jessberger 2014, pp. 290–292; Jessberger 2009, p. 88; Schabas 2009, pp. 17 *et seq*; Bassiouni 2013, pp. 153–155; Cassese 2013, pp. 111–112. See generally, Schabas 2010, pp. 119–120; Saul 2009, pp. 59–63.

¹⁷ Kress has stated that '*Jean-Paul Sartre's* point may be true that the "*fact of genocide is as old as humanity*", but as an international legal concept the crime of genocide is a rather recent arrival.' Kress 2006, p. 466.

¹⁸ For a brief overview on the life and career of Raphael Lemkin, see Vervliet 2012, pp. xi–xvi; Sayapin, 2009, pp. 1157–1162; Cooper 2008, pp. 6 *et seq*; Schabas 2009, pp. 28–29.

¹⁹ Lemkin 1944, 1946, pp. 227–230, 1947, p. 147; Power 2002, pp. 17 *et seq*. See also Werle and Jessberger 2014, pp. 291–292; Barret 2010, p. 35; Schabas 2009, pp. 28 *et seq*, 2010, p. 119; Chalk and Jonassohn 1990.

²⁰ In his seminal short piece, Lemkin eloquently articulated that '[w]hile society sought protection against individual crimes, or rather crimes directed against individuals, there has been no serious endeavor hitherto to prevent and punish the murder and destruction of millions. Apparently, there was not even an adequate name for such a phenomenon. Referring to the Nazi butchery in the present war, Winston Churchill said in his broadcast of August, 1941, "We are in the presence of a crime without a name"', Lemkin 1946, p. 227. See also Kuper 1981, p. 12; Cassese et al. 2001, p. 202.

or tribe, and the Latin word *caedere*, which means to kill.²¹ The semantic of genocide that Lemkin contemplated and adopted²² was much broader in terms of the physical elements as it did include the destruction of the culture of the group, but narrower with respect to the scope of the protected group, than the definition adopted subsequently by different treaties.²³

The Shoah was not punished as genocide *per se* because genocide was not included and defined as an independent or autonomous crime in the International Military Tribunal at Nuremberg (IMT) Charter, nor was it defined and codified as a distinct crime as such under international criminal law.²⁴ Neither the Charter of the International Military Tribunal for the Far East (IMTFE)²⁵ nor the Allied Control Council Law No. 10²⁶ listed genocide as a separate or discrete crime as such. However, the term genocide was mentioned in some of the IMT indictments, as well as in the prosecutorial speeches and in the decision handed down by the US Military Tribunal sitting at Nuremberg, to describe the atrocities committed by the Nazis.²⁷ The word genocide was mentioned neither in the judgments of the IMT nor the IMTFE; however, this does not mean that the major German war criminals

²¹ Lemkin 1944, p. 79, 1946, pp. 228, 1947, p. 147; Werle and Jessberger 2014, p. 292; Ambos 2014, p. 1; Schabas 2009, p. 29.

²² The definition of genocide that Lemkin suggested was as follows: genocide is ‘a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group’, Lemkin 1944, p. 79.

²³ See generally Schabas 2009, pp. 30; Cassese 2013.

²⁴ Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, Article 6. For detail discussion, see generally Schabas 2007; Cassese 2013; Drumbl 2011; Nersessian 2010; Quigley 2006; McGoldrich et al. 2004; Krammer 2010; Jones 2011; Aarons 2008; Slade 2007; Sneh 2011. For a collection of essays on the Nuremberg Trial, see Mettraux 2008.

²⁵ See Article 5(c) of Charter of the International Military Tribunal for the Far East.

²⁶ See Article II(1)(c) of Allied Control Council Law No. 10.

²⁷ See United States Military Tribunal Sitting at Nuremberg, *Greifelt and others*, Judgment, in TWC, Vol. 5, 10 (March 1948), pp. 88–167; Shany 2009, pp. 7–9; Ambos 2014, pp. 1–2; and Schabas 2009, pp. 43 *et seq.* In 1947, the Polish Court in the *Hoess* case mentioned the term genocide; see Supreme National Tribunal of Poland, *Hoess Rudolf Ferdinand*, in LRTWC, Vol. 7 March 1948, p. 24, and Supreme National Tribunal of Poland, *Hauptsturmführer Amon Leopold Goeth* Vol. (27th 31st August and 2nd–5th September 1946, p. 7.

responsible for the Holocaust went unpunished. The fact of the matter is that the horrendous acts committed by the Nazis against the Jews and other minority groups were addressed and punished as crimes against humanity, particularly the acts of persecution and extermination.²⁸

Even some years after the historic Nuremberg trial, genocide was not directly recognized as an autonomous or discrete crime in its own right. It was yet to be divorced from the subset of crimes against humanity and declared a separate crime under international law. Genocide was recognized as a crime under international law with the unanimous adoption of the UNGA Resolution 96(I) in 1946.²⁹

The Resolution stated that

genocide is a denial of the right of existence of the entire human groups, as homicide is the denial of the right to live [of] individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups.³⁰

The text cited above shows clearly that the interest protected by the criminalization of genocide, in contradistinction to other crimes, is the right to existence of human groups, and it is not limited merely to the persecution of a civilian population. The Resolution also contextualized genocide in the broader sense of protected groups which included political groups as one of the beneficiaries or receivers of protection against genocidal acts.³¹ Most importantly, the Resolution empowered the UN Economic and Social Council (ECOSOC) to prepare and present a draft convention to the UNGA.³² On 9 December 1948, the Genocide

²⁸ Charter of the International Military Tribunal August 1945, Article 6(c); International Military Tribunal at Nuremberg, *United States et al v Hermann Wilhelm Göring et al in Trial of the Major War Criminals*, Judgement, 14 November 1945. See Jessberger 2009, pp. 90–91; Werle and Jessberger 2014, p. 292; Schabas 2009, pp. 44–46.

²⁹ UNGA Resolution 1946. See Werle and Jessberger 2014, p. 292; Shany 2009, pp. 8–9; Cassese 2013; Schabas 2009.

³⁰ UNGA Resolution Resolution 1946. See also ICTR, *Prosecutor v Akayesu*, Judgment, *ICTR-96-4-T*, 2 September 1998, §§ 468–469; Werle and Jessberger 2014, p. 292, marginal no. 779; Schabas 2009; Fronza 1999, p. 109.

³¹ UNGA Resolution 1946.

³² On the drafting history of Genocide Convention, see Lippman 1985, pp. 1–65; Robinson 1960; Schabas 2009, pp. 79 *et seq*; Kress 2006, pp. 465–467; Werle and Jessberger 2014, pp. 291–292; Triffterer and Ambos 2016, pp. 128–129; Ambos 2014, pp. 1–2; ‘Genocide: A Commentary on the Convention’ 58 Yale L. J. (1948–1949), pp. 1142–1160; King et al. 2007–2009, pp. 13–28;

Convention was adopted unanimously by the General Assembly.³³ The definition of genocide under the Genocide Convention is brought into focus hereinbelow.

Definition of Genocide Under the Genocide Convention

The Genocide Convention defines genocide as a distinct crime under international law, with its own peculiar material (or objective) and mental (or subjective) elements.³⁴ With the adoption of the Genocide Convention, the crime of genocide has not undergone any further refinement ever since and thus remains a single instrument crime. As noted by Bassiouni ‘genocide is addressed in a single specialized convention that has never been amended or supplemented, notwithstanding the pressing need to do so.’³⁵

The debate about the pressing need to amend the Genocide Convention is a matter beyond the ambit of this book. However, it is clear that since 1948 the semantics of the crime of genocide has remained unchanged and has been reproduced *tel quel* into several legal instruments, including the ICC Statute,³⁶ the

³³ It is the first human rights instrument adopted by the UN. The adoption of the Genocide Convention is referred to as ‘a registration of protest against past misdeeds of individual or collective savagery rather than to an effective instrument of their prevention or repression.’ Oppenheim 1955 as quoted in Lippman 1985, p. 60.

³⁴ The Convention defined genocide as follows: ‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.’ Article 2 of the Genocide Convention. See also Preamble, Articles 1 and 3 of the Genocide Convention.

³⁵ Bassiouni 2013, p. 154. See also Lippman 1999, pp. 589–613.

³⁶ Article 6 of the ICC Statute, Article 4(2) of the ICTY Statute, Article 2(2) of the ICTR Statute, and Article 4 of the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004. The statutes of the ad hoc tribunals also directly reproduced the modes of participation that are recognized under Article III of the Genocide Convention. The same approach has not been followed for the Rome Statute. See generally, Werle and Jessberger 2014, pp. 292–293; and Ambos 2014, pp. 3 and 140.

Statute of the ‘African Criminal Court’,³⁷ and in the national laws of many states. The Genocide Convention deviated significantly from the 1948 UNGA Resolution.

³⁷ In 2008 the AU adopted a Protocol to merge the two African Courts, namely the African Court of Justice and the Human and Peoples’ Rights Court. The Protocol has not entered into force, as it has not received the 15 minimum ratifications. The would-be merged Court is named the ‘African Court of Justice and Human Rights.’ This Court will have jurisdiction over general affairs and human right issues. See Protocol on the Statute of the African Court of Justice and Human Rights (2008). Available at AU <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights>. Accessed 20 June 2017. Article 9 of the 2008 Protocol requires 15 ratifications for it to come into force. So far, only six countries have ratified, namely, Benin, Burkina Faso, Liberia, Libya, Mali, and Congo. The status of the Protocol can be checked at: https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african COURT_of_justice_and_human_rights.pdf. Accessed 20 June 2017.

At the June 2014 meeting in Malabo, the AU adopted a Protocol that expanded the jurisdiction of the African Court of Justice and Human Rights to criminal matters by creating an International Criminal Law Section (in this book also referred to as the ‘African Criminal Court’). Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014. Hereafter the ‘Malabo Protocol 2014’. The Malabo Protocol is yet to enter into force. At the time of writing, not even a single African country has ratified the Protocol. Nine countries, namely, Benin, Chad, Congo, Ghana, Guine-Bissau, Kenya, Mauritania, Sierra Leone, and Sao Tome and Principe, have so far signed the Malabo Protocol. For the status list of the Malabo Protocol, see <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>. Accessed 20 June 2017.

The new African Court has three Sections: General Affairs, Human Rights and Peoples’ Rights; and International Criminal Law Section. The Statute of the African Court of Justice and Human and Peoples’ Rights (the applicable law of the African Court that is annexed to the Malabo Protocol), which is yet to enter into force, vests the Criminal Section with jurisdiction over 14 (international and transnational) crimes, namely, genocide, war crimes, crimes against humanity, the crime of unconstitutional changes in government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploration of natural resources and aggression. See Articles 16, 28A of the Statute and Article 3 of the Malabo Protocol. Genocide is one of the crimes over which the Criminal Section will exercise jurisdiction once 15 states have ratified the Protocol. The Statute more or less adopted or mirrored the definition of Genocide under Article II of the Genocide Convention. Cf. Article 28B of the Statute, Article 6 of Rome Statute; and Article II of the Genocide Convention. The only clarification brought about by the Statute is the addition of the words ‘rape or any other acts of sexual violence’ as one of the material elements of genocide, Article 28B(f). This is not a novel creation of the Statute but a progressive clarification. It is not novel because in the ICTR jurisprudence it had already been established that acts of ‘serious bodily and mental injuries’ can be interpreted to cover rape and other acts of sexual violence under the crime of genocide. It is stated that ‘rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole [...]. Sexual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself’ ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Judgement, (1998), paras 731–732. See also ICTR, *the Prosecutor v Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Trial Judgement, (1999), para 95; ICTR, *the Prosecutor v Emmanuel Rukundo*, ICTR-2001-70-T, Trial Judgment (2001), paras 574–575; and ICTR, *the Prosecutor v Alfred Musema*, ICTR-96-13-T, Trial Judgment, 27 January 2000, para 933. See also Werle and Jessberger 2014, p. 304; Miller 2003–2004, pp. 349–373. For a discussion on the African Criminal Court, see Werle and Vormbaum 2017.

It narrowed down the lists of protected groups and offered a narrower scope of protection to only four exhaustively listed groups. As Shany remarks, '[t]his means that the scope of the protection offered by the Convention is relatively limited, and that a number of "blind spots"—certain serious attacks on vulnerable groups—have been left unattended by the drafters.'³⁸ The exclusion of mainly political groups has been repeatedly mentioned as one of the flaws of the Convention.³⁹ In addition, other subsequent international legal instruments have not remedied this deficiency.

Be that as it may, genocide, which is labeled variously as 'the crime of crimes',⁴⁰

³⁸ Shany 2009, p. 11; Bassiouni 2013, p. 154.

³⁹ Martin 2009, pp. 114–117; Cassese 2013, pp. 119–122; Nersessian 2010, p. 21; Bruun 1993, pp. 206–207; Van Schaack 1997, pp. 2259–2291.

⁴⁰ The ICTR Trial Chamber stated bluntly that 'genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence' ICTR, *Prosecutor v Jean Kambanda*, Trial Judgment, ICTR 97-23-S 4 September 1998, para 16. See also ICTY, the *Prosecutor v Krstić*, Appeal Judgment, IT-98-33-A, 19 April 2004, §§ 36, 134; ICTR, *Kambanda v The Prosecutor*, Appeal Judgment, ICTR 97-23-A, 19 October 2000, § 16; ICTY, *The Prosecutor v. Jelisić*, Appeal Judgment, IT-95-10-A, 5 July 2001, § 13; ICTR, the *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 16. See also Schabas 2009. The ICTR Appeal Chamber subsequently remarked that 'there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are "serious violations of international humanitarian law" capable of attracting the same sentence.' ICTR, *Prosecutor v Kayishema and Ruzindana*, Appeal Judgment, ICTR-95-1-A, June 2001, para 367. In dealing with the seriousness of crimes against humanity vis-à-vis war crimes, the ICTY Appeal Chamber held that 'crimes against humanity is intrinsically more serious than war crimes. ... all things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime.' ICTY, *Prosecutor v Erdemović*, Appeal Judgment, ICTY, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, (1997), para 20; and ICTY, *Prosecutor v Dra'én Erdemović*, Appeal Judgment, ICTY, IT-96-22-A, 7 October 1997, p. 508. Cassese noted that 'generally speaking, one cannot infer from international criminal provisions on penalties that a criminal offence is regarded as more serious than another. ... In short, one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. In abstracto all international crimes are serious offences and no hierarchy of gravity may a priori be established between them (for instance, between war crimes and grave breaches of the Geneva Conventions, or between war crimes and crimes against humanity.)' When the very same conduct of an accused is regarded as constituting a material element of various crimes (killing as a crime against humanity and a war crime), the gravity and ensuing penalty should be determined on a case-by-case basis. Contrary to the majority in the Appeal Sentencing Judgment, Judge Cassese argued that 'whenever an offence committed by an accused is deemed to be a "crime against humanity", it must be regarded as inherently of greater gravity, all else being equal (ceteris paribus), than if it is instead characterized as a "war crime". Consequently, it must entail a heavier penalty... ' ICTY, *Prosecutor v Tadić*, Judgment, ICTY, IT-94-1-A and IT-94-1-Abis, Separate Opinion of Judge Cassese, Appeal Judgment in Sentencing, (2000), paras 6, 7 and 16. From this, it is clear that in the case law of the UN ad hoc courts; there were no unanimous positions about the relative seriousness of core crimes. Under Article 6 of the ICC Statute it is not clear, to be precise, is yet to be judicially settled or determined, whether the list of the crimes was made in hierarchical order or not. In his commentary on the Rome Statute, Schabas observed that '[t]o the extent it is accepted that there is a hierarchy in international crimes, genocide unquestionably sits at its apex.' Schabas 2010, p. 119. Ambos observed that there is abstract ranking of the core crimes. He states that 'focusing on contextual elements, murder, as a crime against humanity seems to be more

‘the greatest of evils’,⁴¹ or ‘an odious scourge’,⁴² is one of the *jus cogens* crimes that impose *erga omnes* obligation on states.⁴³ The International Court of Justice (ICJ) in its advisory opinion on the effects of reservation to the Genocide Convention noted that ‘the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation.’⁴⁴ Accordingly, the Genocide Convention (at least some provisions thereof) is a peremptory norm which is enforceable by all states and from which a deviation is not legally possible. Therefore, all states, including non-member states, are bound by most of the principles and tenets envisaged under

serious than murder as a war crime. The same applies, *mutatis mutandis*, to the relationship between genocide and war crimes. The attack on the existence of a protected group, accompanied by the requisite *dolus specialis*, makes genocide a more serious crime than a war crime. On the other hand, genocide is a crime against humanity, and as such, it possesses structurally the same rank as crimes against humanity. However, given its specific purpose of protection with regard to certain groups, its materially distinct elements, and the *dolus specialis*, genocide is a more fundamental, and thus more serious crime against humanity.’ Ambos 2014, pp. 252–253. Ambos states furthermore that ‘all else being equal, a hierarchy *in abstracto* between international crimes can be established with genocide being the most serious crime, followed by crimes against humanity and war crimes. This ranking, while not following from the Statutes or Rules of Procedure and Evidence (RPE), is confirmed by the sentencing practice of the ICTY and ICTR, punishing genocide more severely than crimes against humanity and war crimes, and the former more severely than the latter.’ Ambos 2014, p. 254. For Bassiouni, the crime of aggression stands at the top followed by genocide, crimes against humanity and war crimes, in this order, Bassiouni 2013, pp. 148 and 230. What is clear is that from a plain reading of the text of the law there is no any explicit ranking of the core crimes. In line with this, the ICTY Appeal Chamber held that ‘in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case. The position is similar under the Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference.’ ICTY, *Prosecutor v Tadić*, Judgment in Sentencing Appeal, ICTY, IT-94-1-A & IT-94-1-Abis, (2000), para 69. Similarly the ICTY rejected a hierarchy of crimes in *Prosecutor v Blaskić*, Trial Judgement, IT-95-14-T 3 March 2000. In 2004, the UN Commission of Inquiry in Darfur, while concluding that the government of Sudan did not harbour a genocidal intent to annihilate the ‘African tribes’ in Darfur, stated that ‘depending on the circumstances, such offenses as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide.’ See Report of the International Commission of 2005, para 521. Thus, in *abstracto*, equal treatment approach of the core crimes seem to have become more acceptable, than intrinsic seriousness of one over the other.

⁴¹ May 2005, p. 158.

⁴² Shany 2009, p. 11; Schabas 2005, pp. 871–885.

⁴³ International Court of Justice, *Belgium v. Spain*, ICJ Report, 5 February 1970; UNGA Resolution 1946; the Genocide Convention Preamble and Article 1; ICTR, *the Prosecutor v. Bagilishema*, Trial Judgment, ICTR-95-1A-T, 7 June 2001; ICTR, *the Prosecutor v. Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 88; UN Secretary-General’s Report 1993; Cassese 2002, p. 337; Wouters and Verhoeven 2005, pp. 401–416; Bassiouni 2013, p. 240; Kress 2006, p. 468; Akhavan 2005, pp. 989–990; and Edwards 1981, pp. 300 *et seq.*

⁴⁴ ICJ Reports 1951, p. 23; Shany 2009, p. 15.

the Genocide Convention. As mentioned above, the definition of genocide and other principles contained in the Genocide Convention have been reproduced verbatim into the domestic laws of many states,⁴⁵ and in the statutes regulating different international tribunals.⁴⁶ Many international tribunals were vested with jurisdiction to try the crime of genocide, and they have done so.⁴⁷ In this regard, the contribution of the case law of the two UN *ad hoc* Tribunals in clarifying some tenets of the crime of genocide is of pivotal importance. By mid-2016, 147 states had ratified the Genocide Convention.⁴⁸

Ethiopia has been amongst the first states to ratify the Convention.⁴⁹ Six years after the coming into force of the Genocide Convention, Ethiopia implemented the Convention under its domestic law. Unlike many states which directly transposed into their respective domestic laws a prototype of the definition of genocide provided in the Genocide Convention, Ethiopia expanded the semantic of genocide and arguably remedied some defects or flaws of the Convention.

3.3.1.2 Genocide Under the 1957 Ethiopian Penal Code: Definition

The Penal Code criminalized genocide as a category of crimes against the laws of nations. It is defined under the Penal Code as follows:

Article 281. Genocide; Crimes against Humanity

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:

- (a) killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
- (b) measures to prevent the propagation or continued survival of its members or their progeny; or
- (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance

⁴⁵ Shany 2009, p. 15; Kress, 2006, p. 468.

⁴⁶ See Article 17 of the International Law Commission Report 1996, Draft Code of Crimes against the Peace and Security of Mankind; Article 4 of the ICTY Statute.; Article 2 ICTR Statute; Article 4 of Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea 10 August 2001; Regulation 2000/15 of UNTAET on the establishment of panels with exclusive jurisdiction over serious criminal offenses; and Article 6 of the ICC Statute.

⁴⁷ On 2 September 1998, the ICTR delivered the first conviction for the crime of genocide by international tribunal. ICTR, *Prosecutor v Akayesu*, 1 Trial Judgment, CTR-96-4-T, 2 September 1998.

⁴⁸ United Nation Treaty Collection available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-1&chapter=4&lang=en. Accessed 15 June 2016.

⁴⁹ United Nation Treaty Collection available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-1&chapter=4&lang=en. Accessed 16 June 2016.

is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.⁵⁰

This definition of genocide was transposed to the new Criminal Code without significant modification.⁵¹ The Article of the Penal Code bluntly stated that genocide as a crime that protects the peace, existence, and well-being of the international community can be committed both in times of war and peace.⁵²

Genocide is named by the legislature as '*zeren matefat*' in the Amharic (working language of the Federal government and some regions in the FDRE)⁵³ version of the above-mentioned Article. It is the authoritative version whenever there is inconsistency. The literal tenor of '*zere*' is 'race', and of '*matefat*' is 'destroying,' thus *zere matefat* means eliminating a racial group that is akin to the etymological definition of the term genocide. The Amharic counterpart of the term genocide, as used in the caption of Article 289, is a misnomer in the sense that it does not indicate the content of the Article. The title limited genocide to the destruction of one group, meaning a racial group only. This is why Mengistu, his cronies and others, including opposition members of Parliament (2005–2010),⁵⁴ have fervently

⁵⁰ Article 281 of the Penal Code. The new Code clarified the use of certain words. For instance, it clarified the hazy wording in the unclear Amharic version of the old Penal Code by providing expressly for the concept of 'political groups' as opposed to the old reference to a 'politically united multinational section of society.' Moreover, the confusing caption of Article 281 of the 1957 Penal Code is also remedied by the new Criminal Code of 2014. Cf. the Amharic version of Article 281 of the Penal Code and Article 269 of the Criminal Code. However, as will be shown, there are some aspects that the new Code failed to address. Most importantly, the missing phrase 'as such' should have been added in the new Criminal Code as it is one of the crucial elements of the crime of genocide.

⁵¹ Article 269 Criminal Code.

⁵² This is relevant in the context of the time when the Penal Code was promulgated because then the nexus between crimes against humanity (under which genocide was subsumed) and armed conflict was not clearly removed. In other words, it is a trite fact that in Nuremberg the crime of genocide had yet to become an autonomous crime. It was instead treated as part of crimes against humanity specifically the acts of persecution and extermination. And under the Charter of the IMT, crimes against humanity needed to have a nexus with war crimes or aggression. In other words, crimes against humanity could be committed in times of peace but could not be prosecuted if not committed in the context of conflict. Hence, stating under the Penal Code that genocide does not need a nexus to conflict was a necessary clarification. However, under the new Code this is not necessary, as the nexus requirement has already been removed long ago.

⁵³ Article 5 the FDRE Constitution, Article 5 of the Revised Constitution of the Southern Nation, Nationalities and People's Regional State, Proclamation 31 of 2001; Article 5 of the Revised Constitution of the Amhara Regional State, Proclamation 59 of 2001.

⁵⁴ The few opposition members of Parliament (2005–2010) stated that the *Derg* officials should have not been charged with genocide because they never committed genocidal acts against any ethnic groups. This is correct, but genocide under Ethiopian law is not limited only to genocidal acts against ethnic groups, for it includes political groups as well. See The Chief Prosecutor Girma Wakjira's Report to the Parliament, Part II available at <http://www.ethiotube.net/video/8194/Documentary-findings-of-human-rights-abuses-during-Red-Terror-era-Part-2>. Accessed 20 June 2016, and for discussion whether the acts of *Derg* officials amount to genocide or not see *infra* Sect. 6.1.5.

opposed the charging and/or conviction of the *Derg* officials for the crime of genocide. Their reasoning was that *Derg* officials did not commit genocidal acts against any of the specific racial or ethnic groups in Ethiopia.⁵⁵ They took the literal meaning of the Amharic caption *zeren matefa*, which does not include other groups but only racial group. Although the definition provided under the above-mentioned Article evidently expressed the categories of protected groups and the structure of the crime of genocide, it would have been better had such wording (*zeren matefat*), which gives an erroneous impression, been avoided in the caption.⁵⁶

From the above-quoted definition of the crime of genocide under the Ethiopian Penal Code, the structure of genocide can be compartmentalized into different individual acts against certain protected groups, the general mental element, and genocidal intent.

Actus Reus of Genocide

Akin to the structure of other crimes, genocide has material elements that have to be committed against the enumerated protected groups for criminal liability to ensue. For legal responsibility to arise, the perpetrator has to order, attempt, incite, or commit one or all of the objective elements of genocide against members of the protected groups. The material elements of genocide are outlined and analyzed below.

Individual Acts

Article 281 of the Penal Code enumerated five exhaustive categories of individual acts of the crime of genocide. These are: (i) Killing members of the groups; (ii) Causing serious bodily or mental harm to members of the groups; (iii) Imposing measures to prevent progeny or birth within the group; (iv) Compulsory movement of peoples or children; and (v) Placing the group under living conditions in order to bring about its destruction.⁵⁷ The shared commonality of those individual acts of genocide is that they are attacks aimed at the physical or biological destruction of the groups enumerated as possible targets of genocide. In other words, they are attacks that target the physical and/or social existence of the members of the protected groups. Akin to the Genocide Convention, cultural genocide is not covered comprehensively by the provision of the Penal Code.

As can be discerned from the above provision, the physical elements enumerated under the Code are more or less similar to those enshrined in the Genocide

⁵⁵ See *infra* Sect. 6.1.5.

⁵⁶ *Ibid.*

⁵⁷ Article 281 Penal Code. *Cf* Article 269 FDRE Criminal Code, Article 6 of the Rome Statute, Article 2 of the Genocide Convention; Article 2 of the ICTR Statute.

Convention. However, under the Penal Code, the forceful transfer of people of the group to another group was also regarded as one of the individual acts of genocide. It is not clear why the drafters of the Penal Code included the term ‘children’ in conjunction with the broader word ‘people’, which could obviously cover the former. Under the Genocide Convention, it is only forcible transfer of children, not people, which is regarded as one of the individual acts of genocide. From the reading of the phrase, ‘the compulsory movement or dispersion of peoples or children’ one might tend to conclude that ethnic cleansing is regarded as genocide under Article 281 of the Penal Code. Nonetheless, it is doubtful whether a mere compulsory transferring of people of one group to another group suffices for the crime of genocide unless the forceful transfer of people is intended to physically exterminate them as well.⁵⁸ To be more accurate, it is not clear how a mere forcible transfer of people is regarded as one of the categories of individuals acts of the

⁵⁸ As aptly stated “ethnic cleansing’ is not a legal, but a factual term that describes a complex phenomenon’ Jessberger 2009, p. 103. On the origin and usage of the word during the Yugoslavia conflict, see Werle and Jessberger 2014, pp. 308–309; Ambos 2014, p. 15; and Jessberger 2009, pp. 103–104; Schabas 2009, pp. 221 *et seq.*

Ethnic cleansing is defined as ‘rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area’, ICJ, *Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*, Case Concerning application of the Convention on the Prevention and Punishment of the crime of genocide, 2007, para 190. In its decision in the *Krstic* case, which was later endorsed by the Appeal Chamber, the ICTY Trial Chamber, stated that ‘despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.’ ICTY, *Prosecutor v Krstic*, Judgment, IT-98-33-T, (2001), para 580. However, in the *Blagojevic* case, the Trial Chamber adopted a more extensive and liberal interpretation of the acts of genocide by specifically stating that ‘the term “destroy” in the genocide definition can encompass the forcible transfer of a population.’ ICTY, *Prosecutor v Blagojevic and Jokic* Judgment, IT-02-60-T, (17 January 2005), para 665, and paras 650–664. On the debate whether ethnic cleansing constitutes the crime of genocide, see Ambos 2014, p. 16, footnote 104. Whether the act of systematic purging of a civilian population can be punished as a crime of genocide should be determined on a case-by-case basis by taking into account the main aim for the cleansing. As aptly observed, ‘[t]he blanket qualification of ethnic cleansing as genocide than one occasionally encounters is incorrect’ Jessberger 2009, p. 104. This is so because ‘ethnic cleansing is aimed at displacing a population of a given territory in order to render the territory ethnically homogeneous. Thus, ethnic cleansing pursues a different aim than genocide, for it is not directed at the destruction of a group. While the material acts performed to commit these crimes may often resemble each other, the main difference lies in the different specific intents: ethnic cleansing is intended to displace a population, genocide to destroy it. Therefore, it is clear that ‘ethnic cleansing’ need not per se amount to genocide. It would only do so if the perpetrators intended to destroy a protected group in order to render the territory ethnically homogeneous.’ Ambos 2014, p. 16. Where the ethnic cleanser has special genocidal intent, the act can be punished both as genocide and as a crime against humanity since the two ‘crimes have distinct material elements’. In the absence of *dolus specialis*, the act can be punished as a crime against humanity. For a discussion on ethnic cleansing, see generally Cassese 2002, p. 338; Cassese 2013; Triffterer and Ambos 2016, pp. 136–137; Ambos 2014, pp. 15–16; Bassiouni 2013; Jessberger 2009, pp. 103–105.

crime of genocide. The fact of the matter is that the compulsory transfer of people as such, more often than not, fails to fulfil the genocidal intent to eliminate the possible targets of genocide, which is the core element of the crime of genocide. It is clear that there is not any prohibition whatsoever in international law against such extension of the list of individual acts of genocide. However, considering a mere compulsory transfer of people as genocide, or more precisely, as one aspect of cultural genocide, is perhaps tantamount to reducing the severity of the crime of genocide. In fact, it is a trivialization of the nature of the crime. Moreover, it is not possible to successfully invoke universal jurisdiction and other principles recognized under customary international law for those areas expanded by domestic laws beyond the *erga omnes* definition of the crime. In a situation where the forcible transfer of people can cause at least destruction of part of the group, it is legitimate to consider it a crime of genocide. But considering a mere forcible transfer of people as a crime of genocide perhaps is not in tune with the nature of the crime of genocide, just like ethnic cleansing does not perfectly fit into the legal definition of genocide as we know it today. Such conducts can undoubtedly be covered by crimes against humanity.

On the whole, the FDRE Criminal Code reproduced a replica of a list of individual acts of genocide as stipulated under the Penal Code.⁵⁹ It failed to remedy the deficiency of the Penal Code with respect to the individual acts of genocide.

Understanding the Contours of Individuals Acts of Genocide

Neither the Penal Code nor the international instruments define the specific individual acts of genocide. Killing members of the group as one of the individual acts of genocide was not defined by the Penal Code nor by the new Criminal Code. The case law of the ad hoc Tribunals has contributed in particular to defining and understanding the legal contours of the *actus reus* of genocide as well as other elements of the crime. Thus, it is logical to use the jurisprudence of the ad hoc Tribunals to understand the individual acts of genocide because the substantial part of the definition of genocide is borrowed from the Convention and reproduced in the Statutes of the ad hoc Tribunals and in the Penal Code. Therefore, to understand the true essence of most of the acts of genocide it is logical to resort to the case law of the ad hoc Tribunals, although this is in no way binding on Ethiopian domestic courts.

From the case law of the ad hoc Tribunals, by way of negative definition, unintentional killings of members of the groups are not part of the killing contemplated in acts of genocide. Killing, as an individual act of genocide, is restricted

⁵⁹ Article 269 of the FDRE Criminal Code.

to intentional homicide, causing death or murder.⁶⁰ Based on the jurisprudence of the ICTR and the very nature of genocide, that is, a genocidal intent linkage, killing, as one individual act of genocide under the Penal Code, should be understood also as the deliberate killing of members of protected groups. Here there is no legal requirement for the killing to be a premeditated killing.⁶¹ What matters is the intentional killing of individuals for being members of the protected group, with genocidal intent to destroy them.

Causing serious bodily injury or mental harm, as another individual act of genocide, was also transplanted from Article 2 of the Genocide Convention to the Penal Code. Both the Penal Code and the Genocide Convention are silent on the content of what constitutes bodily or mental harm to members of the group. In this regard, the case law of the ICTR is helpful. The Court expounded on serious bodily or mental harm as acts of torture, whether bodily or mental, falling short of killing that ‘seriously injures the health, causes disfigurement or causes any serious injury to external, internal organs or senses.’⁶² Examples of such acts, which amount to serious bodily or mental injury, include rape, sexual violence, mutilation, and beating.⁶³ As can be grasped from the term ‘serious’, which precedes ‘bodily and mental injury’, it is not any injury to members of the group which amounts to genocide. ‘The term ‘serious’ is applicable to both the bodily and the mental part of

⁶⁰ ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 521; ICTR, *the Prosecutor v Bagilishema*, Trial Judgment, ICTR-95-1A-T, 7 June 2001, §§ 57–58; ICTR, *the Prosecutor v Kayishema and Ruzindana*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, § 151; ICTR, *the Prosecutor v Simba*, I Judgment and Sentence, CTR-01-76-T, 13 December 2005, § 414; ICTR, *Prosecutor v Bagosora et al*, Trial Judgment, ICTR-98-41-T, 18 December 2008, § 2117; ICTR, *Prosecutor v Musema*, Judgment and Sentence, ICTR-96-13-T, 27 January 2000, § 155; Schabas 2005, pp. 157–158; Triffterer and Ambos 2016, p. 138; Jessberger 2009, p. 96; Werle and Jessberger 2014, p. 303; Schabas 2010, p. 131; Ambos 2014, p. 11; Nserko 2000, pp. 116–140; Cassese 2013, p. 115.

⁶¹ ICTR, *the Prosecutor v Kayishema and Ruzindana*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, § 151; ICTR, *Prosecutor v Musema*, Judgment and Sentence, ICTR-96-13-T, 27 January 2000, § 155. See also Cassese 2013, p. 116; Mugwanya 2011, p. 111.

⁶² ICTR, *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 109. See also ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 50; ICTR, *Prosecutor v Musema*, Judgment and Sentence, ICTR-96-13-T, 27 January 2000, § 156; ICTR, *Prosecutor v Semenza*, Judgment and Sentence, ICTR-97-20, 15 May 2003, § 315; ICTR, *Prosecutor v Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, § 108. See also Werle and Jessberger 2014, pp. 303–306; Cassese 2013, p. 116; Jessberger 2009, pp. 97–99; Triffterer and Ambos 2016, p. 138; Schabas 2010, p. 132; Ambos 2014, pp. 11–12.

⁶³ ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, §§ 706–707, §§ 711–712; ICTR, *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, §§ 50–54; ICTR, *Prosecutor v. Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, § 51; ICTY, *Prosecutor v Krstic*, Judgment, IT-98-33-T, 02 August 2001, § 513. See also Werle and Jessberger 2014, p. 304; Cassese 2013, p. 116; Schabas 2009, pp. 185–187.

a person and is dependent upon the extent to which the physical body or mental wellbeing is injured.⁶⁴ Therefore, on the basis of a *contrario* reading of the provision, minor physical or mental harm such as embarrassment, temporary unhappiness, or humiliation, are beyond the ambit of physical or mental harm as one category of genocidal acts.⁶⁵ However, for the serious physical or mental harm inflicted on members of the group to be regarded as a culpable act of genocide, it need not be a permanent or irredeemable harm, or one that causes death.⁶⁶ Rather, what is most important is that ‘the harm inflicted must be objectively capable of contributing to the destruction of the group in whole or in part.’⁶⁷

Conditions calculated to bring about the physical destruction of certain groups as one individual act of genocide is an attack aimed to bring about the eventual or slow elimination of the group rather than immediate killings. The ICTR defined this *actus reus* of genocide as ‘all circumstances the perpetrator deliberately employed to bring about the physical destruction of protected groups.’⁶⁸ Those conditions which can be regarded as a measure to cause the slow death of members of the protected groups, include deprivation or reduction of essential medical services, food, or sanitation below minimum requirements.⁶⁹ The ad hoc Tribunals also interpreted and clarified the constituent element or content of forcible transfer of

⁶⁴ ICTR, *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999 § 106.

⁶⁵ ICTY, *Prosecutor v Krstic*, Judgment, ICTY, IT-98-33-T, 02 August 2001, § 513; ICTR, *the Prosecutor v Seromba*, Appeal Judgment, ICTR-2001-66-A, 12 March 2008, § 46; ICTR, *the Prosecutor v. Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 106 and § 110. See generally Werle and Jessberger 2014, p. 304; Cassese 2013, p. 116.

⁶⁶ ICTY, *Prosecutor v Krstic*, Judgment, ICTY, IT-98-33-T, 02 August 2001, § 513; ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 502; ICTR, *the Prosecutor v. Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 107. See also Ambos 2014, p. 12; Triffterer and Ambos 2016, p. 138; Schabas 2009, pp. 184–187.

⁶⁷ Werle and Jessberger 2014, p. 305.

⁶⁸ ICTR, *the Prosecutor v Kayishema and Ruzindana*, Judgment, ICTR-95-1-T, 21 May 1999, §§ 115. See also ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 505; ICTY, *the Prosecutor v Stakic*, Trial Judgment, IT-97-24-T, 31 July 2003, § 691; ICTR, *Prosecutor v Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, § 52.

⁶⁹ ICTR, *Prosecutor v Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, § 506; ICTR, *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 116; ICTR, *Prosecutor v Musema*, Judgment and Sentence, ICTR-96-13-T, 27 January 2000, § 157. See also Robinson 1960, p. 123; Triffterer and Ambos 2016, p. 139; Werle and Jessberger 2014, pp. 305–306; Ambos 2014, p. 13; Schabas 2009, pp. 188–196; Schabas 2010, p. 132.

children,⁷⁰ and the imposition of measure to prevent progeny.⁷¹ It is, therefore, better to resort to the case law of the ad hoc Tribunals to comprehend what constitutes these genocidal acts.

From the discussion above, it is clear that genocide involves at least one of the above-enumerated acts. The above-mentioned five constituent acts of genocide, amount to genocide if, and only if, the conduct is targeted at members of certain categories of groups, which are generally regarded as protected groups. The focus turns now to the categories of groups that are protected from genocidal acts under the Penal Code of Ethiopia.

Typologies of Protected Groups: The Scope and Definition of the Groups

As shown above, criminalization of genocide affords protection to members of specified lists of protected groups. In other words, more often than not, there are limited categories of groups which are protected against genocidal acts. The following part answers the question of protected groups under the Ethiopian Penal Code.

⁷⁰ See for example *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 118. See also Werle and Jessberger 2014, pp. 307–308; Cassese 2013, pp. 116–117; Triffterer and Ambos 2016, p. 140; Schabas 2009, pp. 201–206; Nsereko 2000, p. 130; Mugwanya 2011, p. 119. In this case ‘the transfer leads to a loss of cultural identity by assimilation of the children of one group to another group, but it does not per se lead to the physical destruction of the group.’ Ambos 2014, p. 15. As eloquently described by Jessberger ‘children when transferred to another group, cannot grow as part of their group of origin, or become estranged from their cultural identity. The language, traditions and culture of their group become or remain alien to the children.’ Jessberger 2009, p. 103. As discussed in the previous part, under the Penal Code it is not only the forceful transfer of children, which was regarded as an act of genocide but also the forceful transfer of people (adults). As convincingly argued by Triffterer and Ambos, ‘the fifth act of genocide [i.e., forcibly transferring children of the group to another group] obviously refers to the transfer of children that result in a loss of their original identity as a group. While this can occur to young children, it seems highly improbable that it could ever apply to adolescents.’ Triffterer and Ambos 2016, p. 140. In fact, Schabas observed that 18 years is a high standard, let alone including adolescent as victims of forceful transfer for crime of genocide. To use his words, he argues that ‘although not stated in the [Genocide] Convention, the genocidal act of transferring children only makes sense with a relatively young children, and eighteen years must be too high a threshold.’ He further stated rightly that ‘[f]rom legal standpoint, while children maybe considered to belong to their parents, the principle completely inapplicable to adults. There is nobody from whom to be forcibly transferred.’ Schabas 2009, p. 203. It is not clear why Ethiopia and a country like Bolivia decided to include the forcible transfer of adults as an act of genocide. See Penal Code of Bolivia, Chap. IV, Article 138.

⁷¹ See for instance ICTR, *Prosecutor v Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, §§ 507–508; ICTR, *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 117; ICTR, *Prosecutor v Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, § 53. See also Cassese 2013, p. 116; Ambos 2014, p. 14; Triffterer and Ambos 2016, p. 139; Schabas 2009, pp. 197–201; Werle and Jessberger 2014, p. 306.

Categories of Protected Groups

It is stated clearly in the Penal Code that genocide is deemed to have been committed when the act of genocide is directed against members of ‘a national, ethnic, racial, religious or political group’ with the intent to destroy them in whole or in part.⁷² From this wording, it is obvious that the Penal Code recognized five groups as protected from genocidal conduct. The Genocide Convention recognized only four groups, namely, ethnic, national, racial, and religious groups.⁷³ The exclusion of other groups, especially political groups, from the list of protected groups under the Genocide Convention elicited criticism of the Convention.⁷⁴

The reasons for exclusion of other groups in general and political groups in particular under the Genocide Convention and their inclusion under the Penal Code are discussed below, following the discussion of the contours of the four protected groups.

Definition of the Four Protected Groups

Akin to the Genocide Convention and other instruments of international tribunals, the Penal Code is silent on the definition of each protected group. Defining the concepts of protected groups is not an easy matter but rather an epic task, because the concepts are a ‘*priori imprecise*.’⁷⁵ Thus, ‘each of these concepts must be assessed in the light of a particular political, social, and cultural context’ or ‘within the socio-historic context it inhabits.’⁷⁶ Hence, the Penal Code’s failure to dwell on

⁷² Article 281 of the Penal Code.

⁷³ Article II of the Genocide Convention.

⁷⁴ See e.g.; Van Schaack 1997, 2259–2291; Harff and Gurr 1988, pp. 359–371; Bassiouni 1992; Nersessian 2010, pp. 51 *et seq*; Paus et al. 1996, pp. 1083 *et seq*. See also LeBlanc 1988, pp. 268–295; Bassiouni 2008, p. 8.

⁷⁵ As observed by a scholar, ‘over the years many have tried to provide some clarity to the terms [national, ethnic, racial and religious], but that their efforts remain unconvincing. This is hardly a surprise, because the concepts of race, ethnic, and national groups are a *priori imprecise*.’ Verhoeven 1991 as cited in Schabas 2009, p. 124. The Trial Chamber in the Rutaganda judgment pointed out that ‘concepts of national, ethnical, racial, and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof.’ ICTR, the *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, Trial Judgment, ICTR-96-3-T, 6 December 1999, para 56. Same reasoning is endorsed in the Musema Judgment. ICTR, the *Prosecutor v Alfred Musema*, Trial Judgment, ICTR-96-13-T, 27 January 2000, para 161.

⁷⁶ ICTR, the *Prosecutor v Georges Anderson Nderubumwe Rutaganda*, I Trial Judgment, CTR-96-3-T, 6 December 1999, para 56. See also ICTR, the *Prosecutor v Alfred Musema*, Trial Judgment, ICTR-96-13-T, 27 January 2000, para 161; Martin 2009, pp. 117–121; Verdirame 2000, pp. 578–598; Szpak 2012, pp. 155–173.

the meaning of each enumerated protected group is, in a way, a better approach since it is indispensable to construe the meaning of each group on a case-by-case basis.⁷⁷

As with the individual acts of genocide, the case law of international tribunals with respect to the definition of protected groups is very important for elucidating the meaning of protected groups.⁷⁸ The ICTR defined ethnic group ‘as a group whose members share a common language or culture.’⁷⁹ A racial group is defined as a group ‘based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors’,⁸⁰ whereas ‘[a] religious group is one whose members share the same religion, denomination or mode of worship.’⁸¹ On the other hand, a national group is defined

⁷⁷ Schabas aptly observed that ‘[t]here is a danger that a search for autonomous meanings for each of the four terms [referring to the four protected groups under the Genocide Convention] will awaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed.’ [...] He further noted that ‘[d]econstructing the enumerations risks distorting the sense that belongs to the four terms, taken as whole.’ Schabas 2009, p. 131.

⁷⁸ Ambos stated that ‘[t]he act of genocide must be directed against a national, ethnical, racial, or religious group as such. A group is a permanent (collective) unity of people, which distinguishes itself from the rest of the population on the grounds of common characteristics shared by its members. As there is no definition of these characteristics in the Convention or elsewhere, they have had to be determined by the jurisprudence.’ Ambos 2014, p. 7.

⁷⁹ ICTR, *the Prosecutor v Jean-Paul Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para 513. The Trial Chamber in the *Kayishema* case defined ethnic group as ‘one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by other).’ ICTR, *the Prosecutor v Clément Kayishema and Obed Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, para 98. See also Genocide Convention Implementation Act of 1987; Werle and Jessberger 2014, p. 299; Ambos 2014, p. 6; Szpak 2012, p. 159; Martin 2009, pp. 116 and 119; Schabas 2009, pp. 143–147; Nersessian 2003, p. 300; Wiessner 2005, pp. 304–305.

⁸⁰ ICTR, *the Prosecutor v Jean-Paul Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para 514. See also ICTR, *the Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, para 98; and Schabas 2009, pp. 143–147. For summary on this, see Werle and Jessberger 2014, p. 299; Ambos 2014, p. 6; Szpak 2012, p. 159; Nersessian 2003, p. 300; Martin 2009, pp. 116, 119.

⁸¹ ICTR, *the Prosecutor v Jean-Paul Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para 515. See also ICTR, *the Prosecutor v Clément Kayishema and Obed Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, para 98; and Schabas 2009, pp. 139–143. This definition seems to preclude non-religious and atheistic group. Werle and Jessberger pointed out that ‘[a] theistic groups are not protected since freedom not to practice a religion is not protected.’ Werle and Jessberger 2014, p. 300. Cf. Nersessian 2003, pp. 300–301; Shaw 1989, p. 807. Lippman and Shah argued that ‘[r]eligious groups encompass both theistic, non-theistic, and atheistic communities which are united by a single spiritual ideal.’ Lippman 1994, p. 29; and Shah 2002, pp. 357–358.

as ‘a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.’⁸²

With the aim to include other groups that are not explicitly listed, a Spanish court interpreted the national group broadly. The Court argued that a national group encompasses a political group, social group and other powerful group.⁸³ This kind of extensive judicial interpretation of national law arose from the fact that genocide is an act perpetrated with the special intent to destroy the whole or *part* (emphasis added) of the protected group—national group in this case. Consequently, when an attack is directed against a political, social or economic group this can be deemed as the destruction of part of a national group. Nevertheless, this is not compellingly convincing especially because of the special intent requirement. The perpetrator’s aim in the case of genocide against a political group is to destroy a group with a specific political conviction and to create ‘a Republic’, or ‘a Democratic’, or ‘a Communist state’, or a place free from a group, which subscribes to some identifiable political beliefs. Whenever the perpetrators of genocidal acts target political groups, they target the members for holding certain political convictions or opinions, and not because of their shared legal bonds (nationality) or their religious beliefs. In others words, the individuals are singled out or become victims of acts of genocide for their mere membership of or affiliation with the specified political group, or for holding some political opinions, and not because of their citizenship or other attributes. In the case of genocide against a political group, it is not all individuals who have the same nationality that often become the target of a genocidal act, rather, it is only those with certain identifiable political convictions who are targeted. In some cases there might be an overlap of protected groups,⁸⁴ however, political convictions or affiliations do not suffice to establish nationality. Thus, extending ‘national group’ to cover all political groups, as the Spanish *Audiencia Nacional* did, is tantamount to not only overstretching and diluting the notion of national group but also ‘violates both the wording and its historical meaning.’⁸⁵ In the opinion of the author, political groups do not fit within the

⁸² ICTR, the *Prosecutor v Jean-Paul Akayesu*, Trial Judgment, ICTR-96-4-T, 2 September 1998, para 512. On the drafting history of inclusion, exclusion and re-introduction of national group in the drafts and final text of the Genocide Convention, see Robinson 1960, p. 59; Schabas 2009, pp. 134–141; Quigley 2006, pp. 150–151; Martin 2009, pp. 115 *et seq.* Under American law, it is defined as ‘a set of individuals whose identity as such is distinctive in terms of nationality or national origins.’ Section 1093 (5), Genocide Convention Implementation Act of 1987. For a summary on the definition of national group, see Ambos 2014, p. 6; and Werle and Jessberger 2014, p. 298.

⁸³ Spanish Audiencia Nacional, Judgment 5 November 1998, s. 5 119 ILR (2002), 331, pp. 340 *et seq.* See also Werle and Jessberger 2014, p. 298.

⁸⁴ Ambos noted that ‘these groups [the four protected groups] are not always clearly distinguishable from each other and very often overlap’, Ambos 2014, p. 7. Schabas convincingly stated that ‘[t]he four terms in the Convention not only overlap, they also help to define each other, operating as four corner posts that delimit an area within a myriad of groups covered by the Convention find protection.’ Schabas 2009, p. 129.

⁸⁵ Kress 2006, p. 476. See also Werle and Jessberger 2014, p. 298.

ordinary and natural meaning of the four protected groups in general. However, states have the sovereign right to define a national group or other protected groups in a broader way to encompass political groups. There is no international prohibition whatsoever against doing so. However, in the absence of such an explicit definition, including political groups by way of interpretation within the other commonly known protected groups is not only overstretching the notions and misreading the intent of the drafters of the Genocide Convention but also has reached too far. Hence, the best option is to explicitly list political groups as one of the protected groups.

Protection of Political Groups from Genocidal Acts: Politicide

Political groups were included in the UNGA Resolution and some of the initial draft texts of the Genocide Convention, but they did not make it to the final text of the Convention. Some authors have argued that the Convention is under-inclusive in its comprehension of protected groups.⁸⁶ In justifying the exclusion of political groups from the Convention, Lemkin argued that these groups lack stable and permanent features possessed by other protected groups.⁸⁷ By the same token, the argument of states, such as, Poland, the former Union of Soviet Socialist Republics (USSR), Lebanon, and China, for the exclusion of political groups was based on the same reasoning.⁸⁸ The *travaux préparatoires* of the Convention also seem to support the idea that the groups included in the Convention as protected groups are those whose membership is involuntary and that have stable or permanent form. The ad hoc Tribunals, too, adhered to this line of reasoning in explaining the nature of protected groups and those excluded from the ambit of the Convention.⁸⁹ In other words, groups, such as, political, social, and economic groups, are precluded from the list of protected groups under the Genocide Convention because of their mobile or mutable nature, unlike the four protected groups. The soundest reason for the deliberate exclusion of political and economic groups from the protective scheme of the Convention is that the UNGA wanted to ensure more widespread ratification of the Convention. The inclusion of those groups would have hindered this, as it would be threatening to nations, which engaged in the mass killing and maltreatment of political groups.

⁸⁶ Van Schaack 1997, 2259–2291; Nsereko 2000, pp. 130 *et seq.*

⁸⁷ Lemkin 1944, pp. 85–87.

⁸⁸ Schabas 2009, p. 152 *et seq.*; Mugwany 2011, p. 69; Robinson 1960, pp. 58–60. See generally Lemkin 1944.

⁸⁹ See for example ICTY, *Prosecutor v Stakic*, Trial Judgment, IT-97-24-T, 31 July 2003, § 24; ICTY, *Prosecutor v Jelusic*, Trial Judgment IT-95-10-T 14 December 1999, § 69; ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 511; ICTR *the Prosecutor v Kayishema and Ruzindana*, Trial Judgment, ICTR-95-1-T, 21 May 1999, § 98; ICTR, *Prosecutor v Rutaganda*, Judgment and Sentence ICTR-96-3-T, 6 December 1999, § 57.

The ICTR reasoned unequivocally that the groups protected by the Genocide Convention are those with a ‘permanent and stable fashion’.⁹⁰ Moreover, membership of those protected groups is involuntary—determined by birth, and often irredeemable.⁹¹ In its first judgment, the ICTR held that protected groups are not limited to the four permanent and stable groups explicitly enumerated under Article 2 of the Convention, and that other non-enumerated groups which are not named in the Convention but share the peculiarities of the four protected groups are also protected by the Genocide Convention.⁹² As noted by the ICTR Chamber,

it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.⁹³

In the opinion of the Tribunal, it seems that the list of protected groups under the Genocide Convention, which was mirrored in the Tribunal’s Statute, is open-ended. Accordingly, ‘[a] group is protected even if it does not neatly meet the definition of any one of the four enumerated groups as long as it satisfies the requirements of stability and permanence.’⁹⁴ The approach of the Tribunal leads to the conclusion that any permanent and stable groups, although not expressly enumerated under the Convention, are protected against acts of genocide. Such a liberal interpretation and (mis)reading of the *travaux préparatoires* of the Convention by the Tribunal has been criticized heavily and has not been followed by, nor reflected, in the subsequent decisions of the ad hoc Tribunals.⁹⁵ Mugwanya in his book stated cogently

⁹⁰ ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 511; ICTR, *Prosecutor v Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, § 57.

⁹¹ ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 511.

⁹² ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 516; ICTR, *Prosecutor v Rutaganda*, Judgment and Sentence, ICTR-96-3-T, 6 December 1999, § 57; ICTR, *Prosecutor v Musema*, Judgment and Sentence, ICTR-96-13-T, 27 January 2000, § 162.

⁹³ ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, § 516. See also Kress 2006, pp. 461–502; and Akhavan 2005, pp. 989–990. For summary, see Werle and Jessberger 2014, pp. 300–301; Ambos 2014, pp. 6–7.

⁹⁴ Mugwanya 2011, pp. 66. See also Schabas 2009, pp. 126 *et seq.* Verdirame 2000, pp. 578–598; UN International Commission of Inquiry 2005.

⁹⁵ The same Trial Chamber reflected similar arguments in other two cases. ICTR, *Prosecutor v Rutaganda* Trial Judgment, ICTR-96-3-T, 6 December 1999, para 57; and *Prosecutor v Musema*, Trial Judgment, 27 January 2000, para 162. Nonetheless, the stable and permanent theory as a means to include other non-listed groups has not been endorsed by other Trial Chambers of the Court. Besides, the argument of the Akayesu Trial Chamber has never been endorsed by the Appeal’s Chamber. Recently, the UN Darfur Commission, however, endorsed the Akayesu Trial Chamber’s argument. The Commission stated that ‘[w]hat matters from a legal point of view is the fact that the interpretative expansion of one of the elements of the notion of genocide (the concept of protected group) by the two International Tribunals is in line with the object and scope of the rules on genocide (to protect from deliberate annihilation essentially stable and permanent human groups, which can be differentiated on one of the grounds contemplated by the Convention and the corresponding customary rules). In addition, this expansive interpretation does not substantially depart from the text of the Genocide Convention and the corresponding customary rules because it, too, hinges on four categories of groups, which, however, are no longer identified only by their

that such judicial interpretation goes far beyond the actual terms and intent of the drafters of the Convention, which deliberately provides for protection of only four expressly listed groups.⁹⁶ Likewise, Schabas has fittingly criticized the Tribunal's position in the Akayesu judgment by maintaining that 'the drafters chose the four terms in order to express their intent. If they meant to protect all 'stable and permanent groups', why did they not simply say this?'⁹⁷

It is therefore justified to pose the following question: If the drafters intended to extend protection to non-enumerated groups, why did they not leave the wording of the provision open-ended or as an illustration. Moreover, the Tribunal's attempt to introduce unnamed groups by using the *travaux préparatoires* is less convincing. This is chiefly so because 'the role of the *travaux préparatoires* is to assist in clarifying ambiguous or obscure terms, or those that are manifestly absurd or unreasonable, not to add elements that were left out.'⁹⁸ Even based on the *travaux* of the Convention, it is hardly possible to argue persuasively in favour of protecting non-enumerated groups of a permanent nature.⁹⁹ Thus, trying to include other non-enumerated groups by invoking the permanence and stability test is tantamount to introducing new groups via the back door, which is contrary to the patent will of the vast majority of the signatories to the Convention. Furthermore, the Tribunal's liberal interpretation of protected groups is objectionable and overstretches the terms of the Convention, which is not acceptable according to the general principles of the law of treaties, which require the acceptance of the ordinary and natural meaning of words.¹⁰⁰

Over and above this, arguing that the four protected groups are permanent and stable, as a justification for exclusion of political groups, is contestable at best and flimsy at worst. This is so because all the protected groups, apart from racial groups, are in fact neither permanent nor stable. Some are as ephemeral as political groups can be. Schabas rightly observes that

national groups are modified dramatically as borders change and as individual and collective conceptions of identity evolve. Nationality may be changed, sometimes for large groups of individuals where, for example, two countries have joined or secession has

objective connotations but also on the basis of the subjective perceptions of members of groups. Finally, and perhaps more importantly, this broad interpretation has not been challenged by States. It may therefore be safely held that that interpretation and expansion has become part and parcel of international customary law' UN International Commission of Inquiry, 2005, para 501. See generally Schabas 2009, pp. 151–153; and Mugwanya 2011, p. 68. For brief discussions on this, see Werle and Jessberger 2014, pp. 300–302; and Ambos 2014, pp. 6–7.

⁹⁶ Mugwanya 2011, p. 68.

⁹⁷ Schabas 2005, p. 132. This specific question is not included in the second edition of Schabas's book, see Schabas 2009, pp. 152–153.

⁹⁸ Schabas 2005, p. 132. See also Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (1969).

⁹⁹ Schabas rightly observed that the Akayesu Trial Chamber argument 'was a somewhat extravagant reading of the *travaux*, based on rather isolated comments by a few delegations....' Schabas 2009, p. 152.

¹⁰⁰ Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969.

occurred. Religious groups may come into existence and disappear within a single lifetime. As for ethnic groups, individual members may also come and go, although there will often be formal legal rules associated with this, determining ethnicity as a result of marriage or in the case of children whose parents belong to different ethnic groups.¹⁰¹

Therefore, the permanent or stable criterion could not convincingly and fully justify the exclusion of political groups because most of the enumerated groups are not immutable. Indeed, one cannot only change one's nationality, religion, or even ethnicity; but one also has a fundamental right to change one's identity.¹⁰² However, this is not to say that the degree of immutability of each group is the same. As aptly noted,

[i]t is obvious that some aspects of group identity simply harder to change than others. It is much easier for example, to file legal papers to alter nationality or to change personal religious practices than to alter the results of ethnic heritages or the biological markers of DNA and the skin pigmentation.¹⁰³

Hence, the main precursor for the exclusion of political groups is not primarily the nature of the group, instead, because of the then prevailing East versus West politics and the fear that the inclusion of political groups under the Convention would probably hamper quicker and wider ratification of the Genocide Convention.¹⁰⁴

One of the other justifications which has been recurrently put forth to justify the exclusion of political groups from the Genocide Convention is that the enumerated groups were the main victims and targets of past genocides—historic victimization. Although this apparently has an element of truth to it, in choosing the specific category of groups that are protected from acts of genocide, the Genocide Convention, as a forward-looking legal instrument, should not have been exclusively based on a historical rhetoric, but ought to have been progressive, in tune with the evolving exigencies. The Convention, unlike the Nuremberg and Tokyo Statutes,¹⁰⁵ not meant to address past crimes retroactively, but was meant rather as a prospective law that needed to be anticipatory and forward-looking. The Convention should therefore have protected not only groups, which were historically victims of genocide, but also groups which would most likely be the targets of future waves of genocide. Most importantly, political groups, which are deliberately excluded from the list of protected groups, have been one of the targets of acts of

¹⁰¹ Schabas 2005, p. 133.

¹⁰² Articles 15, 18 of the Universal Declaration on Human Rights. See also Nersessian 2010, pp. 63–64; Nsereko 2000; Schabas 2005, pp. 130–136.

¹⁰³ Nersessian 2010, p. 65.

¹⁰⁴ Robinson 1960, p. 59.

¹⁰⁵ In the cases of the Military Tribunals' and ad hoc courts' establishing instruments, the definition of the crimes were influenced and shaped by the acts that had happened. However, progressive treaties, such as, the Genocide Convention, are supposed to go beyond past events, and have to be anticipatory in their nature.

genocide over the past five decades.¹⁰⁶ It is noted that ‘as an historical matter, no group excluded from the convention has been victimized to the same extent as political groups.’¹⁰⁷ The atrocities in Indonesia, the Cambodian Khmer Rouge mass killings of entire families because of political affiliation, and the mass murders in Equatorial Guinea are few instances that show up the blatant flaws of the Genocide Convention and the need to expand the protection to political groups in a pragmatic way. An attempt to include political groups within the Statute of the Permanent International Criminal Court was made, but to no avail.¹⁰⁸ The definition of genocide adopted under the Genocide Convention has been copied verbatim into the enabling legal instruments of different international tribunals as well as the national laws of states. Genocide thus remains a single instrument crime since 1948. The vast majority of states in the world borrowed or mirrored Articles 2 and 3 of the Convention without any modification.¹⁰⁹ Of the 84 states whose laws were reviewed, 64 adopted the terms of the Convention.¹¹⁰ Some of the other states have narrowed the categories of protected groups by leaving out some of the protected groups listed under Article 2 of the Genocide Convention.¹¹¹ Other states, such as, Belarus,¹¹² Burkina Faso,¹¹³ Canada,¹¹⁴ the Democratic Republic of Congo,¹¹⁵ Estonia,¹¹⁶ Finland,¹¹⁷ France¹¹⁸ and Latvia¹¹⁹ broadly defined protected groups under their respective laws by including groups based on ‘any arbitrary

¹⁰⁶ Harff and Gurr 1988, pp. 62–63.

¹⁰⁷ Nersessian 2010, p. 85.

¹⁰⁸ Von Hebel and Robinson 1995, p. 89; Schabas 2009, pp. 163–164; Bassiouni 2013, p. 154.

¹⁰⁹ Nersessian 2010, p. 85; Schabas 2005, p. 5; Drumbl 2011, p. 45.

¹¹⁰ See Nersessian 2010, Appendix A Table I pp. 268–271. Those countries include Ghana, Hungary, Iraq, Mali, Russia, Spain, Sweden, Uganda, UK, USA and Rwanda.

¹¹¹ Schabas 2005, p. 5; Drumbl 2011, p. 45. For example, Bolivia and Paraguay omit to mention racial groups as a protected group, see Article 138 of the Penal Code of Bolivia and Article 319 of the 1997 Penal Code of Paraguay.

¹¹² Article 127 the Criminal Code of the Republic of Belarus No. 275-3 of 1999.

¹¹³ Article 313 of the Penal Code Burkina Faso Law N°043/96/ADP of 13 November 1996. See also Prevent Genocide international available at <http://www.preventgenocide.org/fr/droit/codes/burkinafaso.htm>. Accessed 5 September 2016.

¹¹⁴ Article 4(3) of Crimes against Humanity and War Crimes Act of Canada SC 2000 and § 318 of Canada’s Criminal Code R.S.C., 1985, c. C-46.

¹¹⁵ Article 1, Chap. 1 of the Penal Code of Democratic Republic of Congo Law No 8-98 of 1998.

¹¹⁶ § 90 of the Penal Code of Republic of Estonia of 1994.

¹¹⁷ § 6 c 11 of the Penal Code of Finland No 39 of 1889 as affirmed by the Act No 1285 of 2000 on Implementation of the Legislative Provisions of the Rome Statute of the International Criminal Court and on the Application of the Statute.

¹¹⁸ Article 211-1 of the Penal Code of France as affirmed by Law No 2002-268 of February 2002

¹¹⁹ § 71 c 8 of the Criminal Code of Latvia of 1998.

criterion'.¹²⁰ Some other states, such as Ethiopia,¹²¹ Bangladesh,¹²² Colombia,¹²³ Costa Rica,¹²⁴ Côte d'Ivoire,¹²⁵ Ecuador,¹²⁶ Poland,¹²⁷ Slovenia,¹²⁸ and Lithuania,¹²⁹ included political groups expressly as one of the protected groups from acts of genocide.¹³⁰

In general, to remedy the flaws and deficiencies of the Convention some states have enlarged or expanded under their respective laws the customary definition of the crime of genocide by including or appending other lists of protected groups, or by elaborating the elements of the crime of genocide.

However, some authors argue that although political groups are not included under the Genocide Convention and other international instruments, which mirrored it, genocide against political groups has eventually attained the status of customary law.¹³¹ Thus, genocide against political groups is part of the norms of *jus cogens*. Accordingly, the blind spot and narrow protection of the Genocide Convention can be addressed by resorting to customary law, at least with respect to political groups.

This argument is not free from criticism. As mentioned above, the vast majority of states have reproduced verbatim the definition of the Genocide Convention. This means that the widespread practice of states, which is one of the fundamental prerequisites for a given practice to attain customary law status, is missing.¹³² In

¹²⁰ Nersessian 2010 Appendix A, Table I pp. 268–71; and Ventura 2011, pp. 1031–1032. Penal laws of different countries can be accessed from Prevent Genocide international <http://www.preventgenocide.org/fr/droit/codes/burkinafaso.htm>. Accessed 5 September 2016. Rule of Law in Armed Project, http://www.geneva-academy.ch/RULAC/national_legislation.php?id_state=52. Accessed 12 September 2016. For summary, see Werle and Jessberger 2014, p. 301; Schabas 2009, pp. 161–162; Ambos 2014, p. 9 footnote 51; and Bassiouni 2013, pp. 153–154.

¹²¹ Article 281 of the Penal Code. Cf Article 269 of the Criminal Code.

¹²² Article 3 of the Bangladesh International Tribunals Act xix of 1973.

¹²³ Article 101 of the Penal Code of Columbia 599 of 2000.

¹²⁴ Article 127 of the Penal Code of Costa Rica of 1998.

¹²⁵ Article 137 of the Penal Code of Côte d'Ivoire Law N°1995-522 of 6 July 1995 modifying Law N°1981-640 of 31 July 1981 See Prevent Genocide international <http://www.preventgenocide.org/fr/droit/codes/cotedivoire.htm>. Accessed 12 September 2016.

¹²⁶ Article 19 of the Penal Code of Ecuador.

¹²⁷ Article 118 c XVI. Offences against peace, and humanity, and war crimes Penal Code of Poland of 1997.

¹²⁸ Article 373 and 378 c 35 of the Penal Code of Slovenia of 1994.

¹²⁹ Article 99 of the Lithuanian Republic Criminal Code VIII-1968 of 2000.

¹³⁰ Nersessian 2010, pp. 268–271; Ventura 2011, pp. 1031–1032.

¹³¹ Van Schaack 1997, pp. 2259–2291.

¹³² Schabas observed that 'there are few such States [which criminalized politicide under their domestic laws], and it is ambitious to suggest that the practice of a few defines some customary norm including political groups in the definition of genocide. The vast majority of States follow the Convention to the letter in their domestic legislation', Schabas 2009, p. 162. On customary international law, see Articles 57 and 63 of the Vienna Convention on the Law of Treaties 1969; and Article 38 of the Statute of International Court of Justice. For a general discussion on how a given state practice evolves into *jus cogens*, see generally Shaw 2003; Brownlie 2008; ICJ, *Nicaragua v US*, Merits, Military and Paramilitary Activities in and Against Nicaragua, 27 June

other words, the minimum yardstick for a practice to be elevated to *jus cogens* status is lacking with respect to political genocide. It is therefore hardly convincing to argue that genocide against a political group is part of the customary international law.

Nevertheless, the Penal Code of Ethiopia arguably remedied the blind spot of the Genocide Convention by including political groups as one of the protected groups, in addition to the four commonly known groups. The new Criminal Code of Ethiopia, which retained the substantial part of Article 281 of the Penal Code, enlarged the scope of protected groups by adding color,¹³³ nationalities, and people.¹³⁴

Genocide against political groups is referred to as ‘political genocide’ or ‘Politicide’.¹³⁵ Politicide is a term used by Harff and Gurr, following the approach of Lemkin in the coinage of genocide.¹³⁶ Politicide is defined as a mass killing on the basis of the political affiliation of the victims.¹³⁷ Although this definition restricts¹³⁸ politicide to the mass killing of a politically defined group of victims, the genocidal acts against political groups are the same as those against the other protected groups. In the same vein, under the Penal Code, there is no significant difference between genocide as known under the Genocide Convention and politicide in terms of their respective material elements. Succinctly put, politicide is recognized as a form of genocide under Ethiopian law.

Some scholars have defined politicide broadly to include all forms of political oppression or purges. They define politicide as:

1986; ICTY, *Prosecutor v Tadic* IT-94-1-A 15 July 1999, §§ 128 *et seq*; Nersessian 2010, pp. 191–200, 127; ICJ, *Colombia v Peru*, Asylum, Merits, 20 November 1950, § 277; and ICJ, *North Sea Continental Shelf, Ger v Den and Neth*, Merits, 20 February 1969, § 76.

¹³³ The Canadian law recognized color group as one category of protected group, see § 318 of Canada’s Criminal Code R.S.C., 1985, c. C-46.

¹³⁴ Article 269 of the Criminal Code.

¹³⁵ Harff 2003, p. 58. See generally Staub 1989; Harff and Gurr 1988, pp. 359–371, 1991, pp. 27–41, 1981, p. 23; Jordan 1986, p. 283.

¹³⁶ Harff and Gurr 1998, p. 560, and pp. 567–568; Harff 1992, pp. 21–41, 1996, pp. 39–58. See also Harff 2003, p. 58; Paust 1987, pp. 283–307; Harff and Gurr 1988, pp. 359–371; Chalk 1997, pp. 32–46; Chalk and Jonassohn 1990, pp. 12–27.

¹³⁷ Harff 2003, p. 58.

¹³⁸ Restricted in the sense that for the crime of genocide there is no need for the actual occurrence of mass killings, killing a member (s) of the group with intent to eliminate the protected group(s) suffices. The definition is also a bit broader in the sense that the mere existence of mass killing seems suffice for political genocide which is commonly not the case. Because normally mass killing in and of itself does not amount to genocide unless it is committed with intent to destroy the group. Nonetheless, the intent to destroy could be inferred from the mass killing itself, but this might not be necessarily true all the time.

a useful rallying term, can encompass more odious forms of aggression against authority, the crime against self-determination, the crime of political oppression, and so forth, while providing a logically related focus in supplementation of the Genocide Convention.¹³⁹

Be that as it may, to remedy the deficiency of the Genocide Convention or to supplement the Convention with regard to politicide, some scholars have proposed the criminalization of politicide in a separate treaty and have indeed crafted what they call a Draft Convention on the Prevention and Punishment of the Crime of Politicide.¹⁴⁰ Nersessian, however, has proposed the criminalization of politicide in an additional protocol to the Genocide Convention, as in the case of the Geneva Conventions and the International Covenant on Civil and Political Rights (ICCPR).¹⁴¹

Under the Penal Code of Ethiopia, politicide has been criminalized as part of the crime of genocide since 1957. Pursuant to the Code, politicide is the commission of any of the acts of genocide against political groups. In other words, politicide is a conduct against a political group that would constitute genocide if committed against other protected groups. There are no differences as regards the objective and subjective elements of the crime of genocide against other commonly known protected groups and against political groups.

Definition of Political Groups: Is Registration a Criterion for Protection?

Apart from listing a political group as one of the protected groups, the Penal Code did not define this group in particular and other protected groups in general. At this juncture, one may raise the questions; what is meant by a political group; and which ones legitimately require legal protection against acts of genocide?

Admittedly, expecting the Code to do so would be asking too much, as defining protected groups in general, and a political group, in particular, is a harder task which needs to be undertaken on a case-by-case basis. However, a general definition, which serves as a guideline to understanding the delineations of protected groups without affecting the anticipatory nature of the law, would have been apt.

As outlined above, with respect to the other four protected groups, the jurisprudence of the ad hoc Tribunals is very helpful in elucidating and delineating some of the peculiarities of the groups. Since political groups are not among the protected groups under international instruments, there is no case law emanating from the international courts that can help to illuminate lucidly what ‘a political group’ means for purposes of genocide. International law, therefore, cannot serve as a beacon to understand what a political group is in the case of genocide.

Under Ethiopian law ‘political organization’ is defined as ‘a social institution registered in accordance with this Proclamation (Political Parties registration law) organizing under which part of the society [sic] and having its own political

¹³⁹ Paust et al. 1996, p. 1087.

¹⁴⁰ Paust et al. 1996, pp. 1087–1088; Paust 1987.

¹⁴¹ Nersessian 2010, pp. 205–207.

program reflecting its own belief and purpose with a view to hold political power by participating in national or regional political activities in a democratic way.¹⁴² This definition is a very restrictive and narrow one to use for purposes of understanding what a political group means, as one of the groups protected against genocide. Thus, political groups, as protected groups from genocidal acts, should not be limited only to registered political parties. Confining political groups to the definition above would not only preclude many politically defined groups from the ambit of protection but would have wider repercussions. Usually, political groups that become the target of acts of genocide are not those which are registered, but those which are castigated as subversive. This is not to say that genocidal acts against politically motivated criminal organizations are covered by the concept of politicide. However, it is not an easy task to differentiate between politically motivated groups that are terrorist organizations and those which are not especially so, in a system where the law can be used as an instrument of repression. This is so because dictatorial governments tend to label their political opponents as subversive or terrorist groupings in laws, which are badly worded and vaguely defined for that matter. This holds true especially for mono-party systems or murderous states, such as Mengistu's or arguably the present, incumbent (EPRDF) regime for that matter.¹⁴³ Under Mengistu's regime, the only party that was legally recognized was the WPE. All other parties were banned and branded as criminal organizations. The *Derg* officials raised the non-registration of the parties and their criminal nature as arguments against the genocide charges with which they were charged.¹⁴⁴ Registration, therefore, should not be the sole criterion for determining the political groups protected against genocidal acts.

To protect political groups effectively against genocidal acts, it is appropriate to define political groups widely from the political rights perspectives.¹⁴⁵ Nersessian correctly states that

a political group, therefore, can be defined by the characteristics of exercising (or having the options to exercise, or being perceived to exercise) any right under international law [and domestic laws] that guarantees political beliefs or participation.¹⁴⁶

Accordingly, political rights, like freedom of association and freedom of political opinion, should be used as a guideline in delineating the ambit of politically unified groups, which are protected against genocidal acts or otherwise.

¹⁴² Article 2(2) Proclamation 573 of 2008.

¹⁴³ The ill- and vaguely-defined acts of terrorism in the Ethiopian law attests to the fact of how law can be used to narrow the political space. Anti-Terrorism Proclamation 652 of 2009.

¹⁴⁴ For the discussion on the arguments of the defendants, see *infra* Sect. 5.3.1.7.

¹⁴⁵ Nersessian 2010, p. 86.

¹⁴⁶ Nersessian 2010, p. 86.

Commission of Individuals Acts against the Protected groups 'As Such'

Under the Ethiopian Penal Code, akin to the Genocide Convention, culpability is incurred where the *actus reus* of the crime of genocide is committed (or attempted or incited) against members of protected groups. However, under the Penal Code, the words 'as such' is missing. It is not clear why the legislature did not include the words as such.¹⁴⁷ The new Criminal Code did not rectify this defect either. The words 'as such' that appear at the end of the *chapeau* of Article II of the Genocide Convention were introduced by the Venezuelan proposal as a compromise to the explicit enumeration of motive.¹⁴⁸ As Schabas has commented, the addition was 'in order to resolve an impasse between those delegations that felt there should be an explicit motive requirement and those viewed this as unnecessary and counter-productive. It resolves nothing, however, and leaves the provision ambiguous as to whether or not proof of genocidal motive is an essential element of the offence.'¹⁴⁹ It is clarified by the jurisprudence of the ad hoc courts that the presence of, or otherwise the existence of a personal motive, is not a *sine que non* for the criminal accountability of *genocidaires*. Indeed, it is irrelevant.¹⁵⁰ In this regard, Werle and Jessberger convincingly maintain that 'it is not necessary for the perpetrator to act for discriminatory reasons, nor is the required specific intent precluded when the perpetrators act out of a variety of motives.'¹⁵¹ Thus, motive or genocidal policy is not a legal ingredient of the crime of genocide.¹⁵² The presence

¹⁴⁷ Probably, it is a result of poor draftsmanship.

¹⁴⁸ For a detailed discussion of the proposals made and debates, see Schabas 2009, pp. 134–141 and 281 *et seq.* See also Schabas 2010, p. 130; Triffterer and Ambos 2016, p. 136; Ambos 2014, p. 40; Jessberger 2009, p. 110.

¹⁴⁹ Schabas 2010, p. 130; Triffterer and Ambos 2016, p. 136.

¹⁵⁰ The Appeals Chamber rightly observed that 'criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2(2)(a) through to (e) were committed with 241 intent to destroy, in whole or in part a national, ethnical, racial or religious' ICTR, *The Prosecutor v Clément Kayishema and Obed Ruzindana*, Appeal Judgment, ICTR-95-1-A, 1 June 2001, para 161. Likewise, in the *Jelisić* case the Appeals Chamber noted 'the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide' ICTY, *Prosecutor v Goran Jelisić*, Appeal Judgment, IT-95-10-A, ICTY, 5 July 2001, para 49. On the bases of these cases, motive is irrelevant as far as criminal liability for the commission of genocide is concerned.

¹⁵¹ Werle and Jessberger 2014, p. 316. See Jessberger 2009, pp. 109–110, where he observes that '[a]s a rule motives of the perpetrator do not matter. Neither is it necessary for the *genocidaire* to act for discriminatory reasons.' See also Cassese 2009, pp. 121–135.

¹⁵² Kress states that 'the rather sterile debate on the motive requirement [during the drafting of Genocide Convention] is revealing only in that it makes clear that contrary to what the wording of the definition may suggest at first reading, the words "as such" have not been used by the drafters to stress the group's nature as a social entity.' Kress 2006, p. 499, footnote, 180.

of motives, however, might be helpful as evidence for determining the *dolus specialis* requirement of the crime and might play a role at the sentencing stage.¹⁵³

In explaining the reason for the inclusion of the words ‘as such’, the ICTR Appeals Chamber stated as follows:

The words ‘as such’, however, constitute an important element of genocide, the ‘crime of crimes’. It was deliberately included by the authors of the Genocide Convention in order to reconcile the two diverging approaches in favor of and against including a motivational component as an additional element of the crime. The term ‘as such’ has the effect of drawing a clear distinction between mass murder and crimes in which the perpetrator targets a specific group because of its nationality, race, ethnicity or religion. In other words, the term ‘as such’ clarifies the specific intent requirement. It does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context. Thus the Trial Chamber was correct in interpreting ‘as such’ to mean that the proscribed acts were committed against the victims because of their membership in the protected group, but not solely because of such membership.¹⁵⁴

This judgment suggests that the words ‘as such’ are indispensable, as they indicate that the attack should be directed against members of the protected groups for the mere reason of their membership in the targeted groups—although the individual members of the group are the direct victims, the group *per se* is the target of the destruction as a social entity.¹⁵⁵ In other words, they connote that the act must have been committed against one or several individuals, not in their individual capacities, but for being (or perceived) members of a specific group.¹⁵⁶

Simply put,

the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial, [political] or religious group. The victim of the

¹⁵³ In the *Tadic* case it is stated that ‘motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit).’ And the Chamber noted [...] the inscrutability of motives in criminal law....’ ICTY, *Prosecutor v Dusko Tadic*, Appeal Judgment, IT-95-1-A, ICTY, 15 July 1999, para 269. See also Behrens 2012, p. 503.

¹⁵⁴ ICTR, *Niyitegeka v Prosecutor*, Judgment, ICTR-96-14-A, 9 July 2004, para 49.

¹⁵⁵ Werle and Jessberger convincingly note that the words ‘as such’ make ‘the reference point of the intent to destroy more precise by requiring that the perpetrator’s desire to kill the victim be based specifically on the victim’s membership in the group. The perpetrator’s interest must be in destroying the group, not the individuality of the victims.’ Werle and Jessberger 2014, pp. 315–316. Kress also noted that “‘as such’ express the idea of the targeting of the group through its members.” Kress 2006, p. 498.

¹⁵⁶ As Lemkin rightly observed, ‘[g]enocide is directed against a national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of a national group.’ Lemkin 1944, p. 79.

act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.¹⁵⁷

Accordingly, the words ‘as such’ signify ‘the idea of the targeting of the group through its members.’¹⁵⁸ However, even if the Penal Code and different international instruments used the plural term ‘members’, the commission of one or more genocidal acts against a member of the protected group with intent to destroy the group would suffice. It is not a legal requirement for the *genocidaire* to succeed and actually destroy the whole or part of protected group.¹⁵⁹ It suffices if the offender commits genocidal acts against one member of the groups with the specific intent to destroy the whole or a substantial part of the group.¹⁶⁰ Put differently, the destruction need not materialize for the person to be held responsible as a perpetrator of the crime of genocide, unlike in the case of crimes against humanity that require the actual occurrence of the attack against civilian population either in a widespread or systematic manner.

As stated above, the victims of genocide are chosen because of their membership of certain protected groups. This is indicated by the words ‘as such’ and the special intent. Hence, the words ‘as such’ should have been included in the Penal Code. It is not clear why the legislature failed to rectify this defect of the abrogated Code when it was replaced by the 2004 Criminal Code. As mentioned above, ‘as such’ is an important definitional element of genocide as it illuminates the special intent requirement. The inclusion of ‘as such’ in the definitional element of genocide shows that the direct victims of the genocide (individuals) are simply the personification of the group; for it is the group that is targeted as such. Therefore, it is submitted that ‘as such’ should have been included in the definition of genocide under Ethiopian law. The fact that words have been omitted, which is most likely attributable to poor drafting skills, has significant implications. However, this does not make the definition under the Penal Code substantially incomplete and

¹⁵⁷ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, § 521. See also *Prosecutor v Nahimana et al*, ICTR-99-52-T, 3 December 2003, § 948; ICTR, *the Prosecutor v Laurent Semanza*, Trial Judgment, ICTR-97-20-T, 15 May 2003, para 312; ICTR, *the Prosecutor v Ignace Bagilishema*, Trial Judgment, ICTR-95-1A-T, 7 June 2001, para 61; *Prosecutor v Rutaganda*, ICTR-96-3-T, 6 December 1999, para 60; and *Prosecutor v Musema*, ICTR-96-13-T, 27 January 2000. For summary on this, see Werle and Jessberger 2014, pp. 315–316; Ambos 2014, pp. 40 *et seq*; Schabas 2010, p. 130; Triffterer and Ambos 2016, p. 136; Jessberger 2009, pp. 109–110.

¹⁵⁸ Kress 2006, p. 498.

¹⁵⁹ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, § 497; *Prosecutor v Jelsic* IT-95-10-T 14 December 1999, § 80; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 95.

¹⁶⁰ On the issue of what constitute part of the groups, see generally the jurisprudence adopted by the ad hoc Tribunals, *Prosecutor v Jelicic* IT-95-10-T 14 December 1999, § 82; *Prosecutor v Krstic*, IT-98-33-T, 02 August 2001, § 634; ICTY, *Prosecutor v Krstić*, Judgment, ICTY, IT-98-33-A, 19 April 2004, § 12; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 96; *Prosecutor v Semenza*, ICTR-97-20, 15 May 2003, § 316. See also Werle and Jessberger 2014, p. 302; Schabas 2005, pp. 231–237; Cassese 2013, pp. 121–122; Cryer et al. 2010, pp. 221–222; Kress 2006, p. 489; Akhavan 2005, 992 *et seq*.

defective. Instead, it makes the definition enigmatic, especially with regard to the special intent to destroy the members of the protected group. Had ‘as such’ been included, it would have helped to understand better why *genocidaires* (not their motives) chose the individuals as the direct targets of genocidal acts. ‘As such’ expresses the important aspect of genocide that the genocidal acts of *genocidaires* are directed against individuals simply because of their membership of the protected group. A *contrario* reading of this indicates that if the genocidal acts directed against the individuals are because of their idiosyncratic identities rather than membership of the protected group that would not qualify as genocide.

Criterion for Identification and Classification of the Protected Groups

Akin to the Genocide Convention and other instruments, the Ethiopian Penal Code, as well as the new Criminal Code, are silent on how to determine and define the protected groups. In light of the jurisprudence of the ad hoc Tribunals, the possible methods to characterize factually the nature and identity of targeted groups are a subjective and an objective approach or a hybrid of the two. The objective approach is a method of characterizing the group, based on the definition of the group, which means objective criteria are used to determine the nature and composition of the targeted group.¹⁶¹ In contrast, the subjective approach is a method to determine the group, based on identification by others (the way perpetrators stigmatize the group) or the way the members perceive themselves (self-identification). Neither of the two approaches is entirely satisfactory and free from flaws. Using solely the subjective approach to identify the protected group ‘would be, ‘allowing a characterization of the crime modelled only on the intent of the offender.’¹⁶² In other words, using perpetrators’ definition of the group as the only criterion to identify a protected group ‘would not only circumvent the drafters’ decision to confine the protection to *certain* groups but would convert the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive.’¹⁶³ This is to say, it would

¹⁶¹ In the *Akayesu* case the ad hoc Tribunal for Rwanda used an approach which was highly inclined to the objective method, see *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, §§ 511–515. Cf *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 98. See also ICJ, *Licht v Guat*, Second Phase, 6 April 1955; Amann 2002, 100–143. Mugwanya 2011, pp. 72 *et seq*; and Akhavan 2005, 989–1006. For a summary on how to identify protected groups, see Werle and Jessberger 2014, pp. 296–297; Triffterer and Ambos 2016, p. 135; Ambos 2014, pp. 8–9; Martin 2009, pp. 122–125; Schabas 2010, pp. 129–130; Schabas 2009, p. 128; May 2010, pp. 40 *et seq*; Kress 2006, p. 474.

¹⁶² Cassese 2009, p. 124. See also Schabas 2005, p. 110; ICTY, *Prosecutor v Brdjanin*, Trial Judgement, IT-99-36-T, 1 September 2004, § 684; *Prosecutor v Semenza*, ICTR-97-20, 15 May 2003, § 317; ICTR, the *Prosecutor v Kajelijeli*, Judgment and Sentence, ICTR-98-44A-T, 1 December 2003, § 811; *Prosecutor v Rutaganda*, ICTR-96-3-T, 6 December 1999, §§ 56–57; Amann 2002, 93–143 57.

¹⁶³ Kress 2006, p. 474. See also Kress 2007, p. 624; Martin 2009, p. 124.

extend protection to abstract groups that have never been envisaged by the law-maker.¹⁶⁴ Therefore, it follows that

[s]ubjective criteria alone may not be sufficient to determine the group targeted for destruction and protected by the Genocide Convention, for the reason that the acts identified in subparagraphs (a) to (e) of Article 4(2) must be in fact directed against “members of the group.”¹⁶⁵

By the same token, using only the objective approach to determine the status of the group would result in precluding some victims and ‘would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorization.’¹⁶⁶ The definition of the protected groups ‘of the crime cannot be left to the perpetrators of the crime but must at least to a certain extent be based on *objective* criteria.’¹⁶⁷ Thus, identification of relevant protected groups has to be made on a case-by-case basis by using an eclectic approach or by combining both subjective and objective approaches.

Mens Rea

The other important legal element of the crime of genocide under the Penal Code is the general *mens rea*¹⁶⁸ and the special (or specific) intent or genocidal intent.¹⁶⁹ Consonant with the general principles of criminal law, the crime of genocide entails criminal liability only if the material and mental elements are established concurrently. The general part of the Penal Code provided for the general mental element applicable to all crimes, including genocide, and the special part of the Code included the specific intent in the definition of genocide.

Under the general part of the Penal Code, two categories of the mental element were provided, namely, an intentional and negligent commission or omission.¹⁷⁰ The negligent commission of the crime was punishable ‘only if the law so expressly provides by reason of nature, gravity or the danger the act constitute to the

¹⁶⁴ Mugwanya 2011, pp. 73 *et seq*; and *Prosecutor v Brdjanin* IT-99-36-T, 1 September 2004 § 684.

¹⁶⁵ *Prosecutor v Brdjanin*, IT-99-36-T, 1 September 2004, § 684.

¹⁶⁶ *Prosecutor v Jelsic* IT-95-10-T 14 December 1999, § 61. See also Ambos 2014, p. 8.

¹⁶⁷ Kress 2006, p. 474. See also Werle and Jessberger 2014, pp. 297–298; Ambos 2014, p. 8; Martin 2009, pp. 125–126; Triffterer and Ambos 2016, pp. 135–136; Mugwanya 2011, pp. 104–107.

¹⁶⁸ This is called by some the first subjective element of genocide while specific intent is referred to as the second subjective element; see Werle and Jessberger 2014, p. 312, marg. No. 835; Triffterer 2001, p. 399.

¹⁶⁹ Ambos aptly observed that ‘[g]enocide is a crime with a double mental element, i.e. a general intent as to the underlying acts, and an ulterior intent with regard to the ultimate aim of the destruction of the group.’, Ambos 2009, p. 1.

¹⁷⁰ Articles 58 and 59 of the Penal Code. Cf. Article 59(2) of the Criminal Code.

society.¹⁷¹ Since Article 281 of the Penal Code did not expressly provide for negligence as a subjective element of the crime of genocide, rightfully so, the general *mens rea* of genocide is constituted in the commission of the individual acts with ‘intent and knowledge’. It is inconceivable for a crime like genocide to be committed unintentionally.¹⁷² Under the Penal Code, a person was deemed to have committed a crime intentionally where: (a) he perform (ed) an unlawful and punishable act with full knowledge and intent in order to achieve a given result; or (b) he being aware that his actions may cause illegal and punishable consequences, commits (committed) the act regardless of what consequences might follow (might have followed).¹⁷³

Similar to the Genocide Convention and Statutes of the ad hoc courts, under the Penal Code liability for the commission of genocide arose only if the perpetrator’s conduct satisfied the material elements (like killing, preventing birth etcetera) with intent and knowledge.¹⁷⁴ Simply put, the general mental element that is required under the Penal Code is congruent with that in the Genocide Convention and Statutes of the ad hoc courts.

The other most important subjective element of the crime of genocide is special intent or *dolus specialis*. The Penal Code, akin to the Genocide Convention, used the general term ‘intent to destroy’ the protected groups in whole or in part.¹⁷⁵ Different terminologies, such as, special intent, specific intent, genocidal intent, or particular intent, have been employed by the ad hoc Tribunals to refer to this element of the crime.¹⁷⁶ It is rightly stated that specific intent is the ‘distinguishing characteristics of the crime of genocide.’¹⁷⁷ This element makes the crime of

¹⁷¹ Article 59 of the Penal Code.

¹⁷² In their comment on Article 6 of ICC Statute Werle and Jessberger aptly state that ‘*dolus eventualis* and recklessness are insufficient to fulfill the mental element of these underlying crimes [the four crimes under the ICC jurisdiction including genocide].’ Werle and Jessberger 2014, p. 313.

¹⁷³ Article 59(1) of the Penal Code.

¹⁷⁴ For a summary on the general mental element of genocide under international criminal law treaties, see Ambos 2014, pp. 18–20; Werle and Jessberger 2014, pp. 312–313; Schabas 2009, pp. 242–260; Triffterer 2001, pp. 400–403.

¹⁷⁵ Article 281 of the Penal Code. Cf. Article 269 of the Criminal Code.

¹⁷⁶ ICTR, *Prosecutor v Kambanda*, Judgement and Sentence, ICTR 97-23-S, 4 September 1998, § 16, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 91; *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, §§ 497; *Prosecutor v Rutaganda*, ICTR-96-3-T, 6 December 1999, § 59; *Prosecutor v Jelacic*, IT-95-10-A, 5 July 2001, §§ 50–52; *Prosecutor v Musema*, ICTR-96-13-T, 27 January 2000, §§ 164–67; *Prosecutor v Semenza*, ICTR-97-20, 15 May 2003, §§ 311–313. See generally Cassese et al. 2001, pp. 211–215, Cassese 2013, p. 118; and Werle and Jessberger 2014, pp. 314–318; Triffterer 2001, pp. 404–407; Triffterer and Ambos 2016, p. 131; Ambos 2014, pp. 21–36; Schabas 2009, pp. 260–268.

¹⁷⁷ The Draft Code of Crimes against the Peace and Security of Mankind with Commentaries (1996), p. 44.

genocide a unique crime under international law that is directed against human existence.¹⁷⁸ As aptly noted,

genocide is distinct from other crimes in as much as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in 'the intent to destroy, in whole or in part, a national, ethnical, racial, (political) or religious group, as such.'¹⁷⁹

It is understandable that proving the general *mens rea* is rarely a simple matter, if not a herculean task. It is even more difficult to prove special intent to destroy protected groups and 'it may be difficult to find explicit manifestations of intent by the perpetrator.'¹⁸⁰ Producing direct evidence that proves genocidal intent beyond any shadow of doubt is, no doubt, exceptionally challenging, though not impossible.¹⁸¹ The presence of a genocidal policy, like the one designed by the Nazis as a 'final solution' for the Jews, constitutes strong evidence of special intent. A genocidal policy or motive of the perpetrator, however, is not a legal requirement for the crime of genocide, but it helps to prove the special intent of the perpetrators.¹⁸² Absent such a clear genocidal policy or other explicit evidence, the only feasible way to prove special intent is by making an inference from different existing facts, circumstances, and elements.¹⁸³ These would include, for example, the number of victims, the scale of the carnage, the nature of the deeds, and words used by perpetrators.¹⁸⁴

In summary, under the 1957 Penal Code, the crime of genocide was broadly criminalized in relation to the protected groups. The Code included political groups as one of the protected groups, in addition to the four groups recognized under the Genocide Convention. Therefore, under the Penal Code, politicide was criminalized as a part of genocide. The non-inclusion of the words 'as such' in the abrogated Code of 1957 and in the 2004 Criminal Code has significant implications.

¹⁷⁸ *Prosecutor v Kambanda*, ICTR 97-23-S, 4 September 1998, § 16; *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 91; *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, § 497; *Prosecutor v Jelusic*, IT-95-10-A, 5 July 2001, § 45; *Prosecutor v Musema*, ICTR-96-13-T, 27 January 2000, §§ 164–67; *Prosecutor v Semenza*, ICTR-97-20, 15 May 2003, §§ 311–313. See Werle and Jessberger 2014, pp. 317–318; Schabas 2005, pp. 217–218.

¹⁷⁹ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, § 498.

¹⁸⁰ *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 93.

¹⁸¹ *Prosecutor v Akayesu*, ICTR-96-4-T, 2 September 1998, § 523.

¹⁸² *Prosecutor v Jelusic*, IT-95-10-A, 5 July 2001, § 48; ICTY, *Prosecutor v Kumarac et al*, Appeal Judgment, IT-96-23 & IT-96-23/1, 12 June 2002, §98; ICTR, *Prosecutor v Ntakirutimana et al*, Appeal Judgment, ICTR-96-10-A & ICTR-96-17-A, 13 December 2004, § 363; and Appeal Judgment, *Prosecutor v Niyitegeka*, ICTR-96-14-A, 9 July 2004, § 53.

¹⁸³ *Prosecutor v Brdjanin*, IT-99-36-T, 1 September 2004, § 970; *Prosecutor v Krstic*, ICTY, IT-98-33-T, 02 August 2001, § 41. See generally Schabas 2005, pp. 222–226; Cassese 2013, pp. 125–126; O'Connor et al. 2007, p. 197.

¹⁸⁴ *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, §§ 93–94; and *Prosecutor v Jelusic*, IT-95-10-A, 5 July 2001.

3.3.2 *Crimes Against Humanity*

Under the Penal Code, crimes against humanity were not independently recognized as a separate crime with its own material (individual acts and contextual element) and mental elements. The naming of the offence under the title of Article 281 of the Penal Code which reads ‘genocide; crimes against humanity’ caused some contention whether this provision was applicable to both genocide and crimes against humanity or only to the crime of genocide.¹⁸⁵ Some have argued that it addresses both categories of crimes.¹⁸⁶ From the title of the Article, it seems that the Code treated genocide as one category of crimes against humanity. It is a trite fact that at the international level the crime of genocide was described or prosecuted as a subclass of crimes against humanity.¹⁸⁷ This has been expressed as follows:

The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of “extermination and persecutions on political, racial or religious grounds” and it was intended to cover “the intentional destruction of groups in whole or in substantial part” (emphasis added). The crime of genocide is a type of crime against humanity.¹⁸⁸

The Penal Code tried to mirror this way of describing genocide as one form of crimes against humanity.¹⁸⁹ It is now over six decades since the crime of genocide was divorced from crimes against humanity and became a separate crime under international law. Although those two crimes have shared peculiarities and may coincide and overlap to some extent in terms of their material elements, to be precise the individual acts, they are different crimes in terms of their respective

¹⁸⁵ Hailegebriel 2003, p. 18; Haile 2000, pp. 48–53. See also Haile-Mariam 1998/99, p. 716; Aneme 2006, p. 76.

¹⁸⁶ Hailegebriel 2003, p. 18; Haile 2000, pp. 49–50.

¹⁸⁷ Article I Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) treats genocide as one category of crimes against humanity. For summary on this, see Cassese 2013, pp. 127–128; Cryer et al. 2010, p. 206; Fronza 1999, p. 118.

¹⁸⁸ *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 89. See also Ambos 2014, pp. 2, 5; and Werle and Jessberger 2014, p. 328.

¹⁸⁹ Cf. the Penal Code of 1972 of Germany Section 16, Crimes against Life, § 220a, Genocide. This repealed provision of German Penal Code regarded genocide as crime against life. See also Article 211-1 of the French Penal Code of 1992, Article 611 of the Estonian Penal Code, and Article 313 of the Penal Code of Burkina Faso that characterized crime of genocide as species of crimes against humanity. See also *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999 § 89; in which the Chamber stated that ‘the crime of genocide is a type of crimes against humanity.’, and affirmed that crime of genocide is different from crimes against humanity.

material (contextual) and subjective elements.¹⁹⁰ Besides, the material elements listed under Article 281 are the typical constituent elements of the crime of genocide and not of crimes against humanity. In other words, based on the same Article it is hardly possible to pinpoint the material elements (contextual elements and individual acts) of crimes against humanity as commonly known.¹⁹¹ Thus, Article 281, apart from its misleading title, regulated only the crime of genocide; crimes against humanity *per se* were not adequately regulated under the Penal Code. Nevertheless, this is not to say that some categories of crimes against humanity could not be addressed by the broadened scope of the crime of genocide under the Penal Code.¹⁹² Assuredly, the crimes against humanity inhere within the wider definition of the crime of genocide under the Penal Code. Put differently, since the difference between the two crimes has been increasingly narrowed down, the broader definition of genocide under the Penal Code could address some categories of crimes against humanity. However, even the broader definition of the crime of genocide adopted by the Penal Code could not cover all cases of crimes against humanity perfectly because of the high threshold of the genocidal intent requirement for the crime of genocide. As mentioned above, each of the two crimes has a distinct contextual element (genocidal intent and widespread or systematic attack for genocide and crime against humanity, respectively); an objective element (often there are overlaps in terms of material elements, i.e., the same act can constitute both genocide and crime against humanity; however the latter covers wider ranges of acts);¹⁹³ and a mental element. Therefore, the one could not replace the other nor could the one adequately protect the interest protected by the other. Cassese states cogently that ‘from the viewpoint of their objective elements the two categories are normally ‘reciprocally special’, in that they form overlapping circles

¹⁹⁰ As discussed in the preceding part, genocide requires commission of certain individual act/s against member/s of the protected group/s with special intent to destroy the group/s as such. Whereas, crimes against humanity are the commission of attack against civilian population [emphasis added] in a widespread or systematic manner. Both the individuals’ acts and the protected groups in the case of crimes against humanity are wider. Genocide only protects limited groups, commonly four. The genocidal acts are also limited to five categories whereas in the case of crimes against humanity there are long lists of acts and in some case, a catchall phrase ‘any other inhuman acts’. Thus, in this sense the two crimes have different elements. See Article 7 of the Rome Statute; Article 28C of the African Court Statute; Article 6(c) of the IMT Charter; Article 5(c) of IMTFE; Article 5 of the ICTY; Article 3 of the ICTR; Article 8 of the Draft Code of Crimes Against the Peace and Security of Mankind. See also Cassese 2002, pp. 339–340; Cassese 2009, pp. 127–128; Triffterer and Ambos 2016, pp. 142–143; Cryer et al. 2010, p. 206.

¹⁹¹ For detailed discussion of, and collection of, relevant materials on the elements of crimes against humanity, see Werle and Jessberger 2014, pp. 327 *et seq.*; Triffterer and Ambos 2016, pp. 245 *et seq.*; Bassiouni 1999; Ambos 2014, pp. 46 *et seq.*

¹⁹² In addressing the similarity and difference between genocide and crimes against humanity, the ICTR stated that ‘[t]here are instances where the discriminatory grounds coincide and overlap.’, *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999, § 89. For analysis of specific scenarios where the two crimes overlap, see §§ 629–637 of the *Kayishema and Ruzindana* judgment. See also Cryer et al. 2010, p. 206; Cassese 2002, p. 339.

¹⁹³ The *Prosecutor v Jelisić*, Judgment of 5 July 2001, § 49.

which nevertheless intersect only tangentially.¹⁹⁴ From their mental element viewpoint, the two crimes are different, in the sense that ‘they form two circles that do not intersect.’¹⁹⁵ As a rule, although not necessarily true all the time, it can be said that a genocidal attack will meet the requirement of a crime against humanity.

The confusing approach of treating the crime of genocide as a category of crimes against humanity persists in the Ethiopia’s law. The supreme law of the country states concisely that

‘[c]riminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation.’¹⁹⁶

From this wording, it is clear that the confusing approach of treating genocide as a subclass of crimes against humanity has been retained in the Constitution, although it is not reflected, rightly so, in the 2004 Criminal Code. The new Criminal Code rightly remedied the flaws of the Penal Code by abandoning the confusing approach of treating the crime of genocide as one form of crimes against humanity. However, nowhere in the new Criminal Code is crimes against humanity expressly addressed as such.

Hence, crimes against humanity are not criminalized as a separate crime as such, both under the Penal Code and the new Criminal Code. While it is true that crimes against humanity are recognized as core crimes at the constitutional level, concededly this provision remains exhortatory as there is no other domestic implementing or enabling legislation which explicitly criminalizes crimes against humanity with the same label or characterization under Ethiopian laws. Although initiatives to fashion a convention that deals with crimes against humanity are underway, they are yet to come to fruition and yet to include crimes against humanity in a single unified convention, like genocide and war crimes.¹⁹⁷ Therefore, as there is no convention that exclusively deals with crimes against humanity, the gap in the national legal framework cannot be filled by resorting to treaty law.

¹⁹⁴ Cassese 2013, p. 128.

¹⁹⁵ Cassese 2013, p. 128. See also Werle and Jessberger 2014, p. 328; Cryer et al. 2010, p. 206; *Prosecutor v Krstić*, ICTY, IT-98-33-A, 19 April 2004, § 36; Palombino 2005, pp. 778–789.

¹⁹⁶ FDRE Constitution Article 28(1).

¹⁹⁷ The International Law Commission (ILC) added the idea of forging convention that deals with crimes against humanity under its active agenda in 2016. In June 2017, the ILC adopted draft Articles for Crimes against Humanity Convention. The draft Convention is prepared by experts under the auspices of Crimes against Humanity Initiative. International Law Commission Third Report on Crimes against Humanity Sixty-ninth Session A/CN.4/704 (2017); and Crimes against Humanity Initiative available at <http://law.wustl.edu/WashULaw/crimesagainsthumanity/about/fact-sheet-about-the-crimes-against-humanity-initiative/>. Accessed 20 September 2017. The draft can be accessed from <https://law.wustl.edu/harris/crimesagainsthumanity/?p=1144>. Accessed 12 June 2016. For a good collection of materials on crimes against humanity and the draft Convention, see generally the relevant chapters in, Sadat 2011.

Two plausible alternatives are available to plug the normative loopholes and lacunae. The first is the ordinary crimes approach, which means using ordinary (domestic) crimes to investigate and prosecute perpetrators of core crimes, crimes against humanity in this case. Most of the individual acts of crimes against humanity, such as, killing, inhumane treatment, deprivation of liberty, rape, and other sexual crimes were criminalized under the Penal Code as ordinary crimes. The use of these ordinary crimes makes it possible to fight impunity and ensure accountability of perpetrators of crimes against humanity.¹⁹⁸ In some cases, the SPP charged *Derg* officials with aggravated homicide as an alternative to the commission of the crime of genocide.¹⁹⁹ Although the Prosecutor did not clearly point out this recourse as an ordinary crimes approach to the prosecution of core crimes, it can be argued that this approach was adopted in the prosecution of the *Derg* officials. This approach is criticized for its lack of the moral censure and condemnation that attach to the core crimes.

Secondly, a resort to international criminal laws, as another source for the prosecution of crimes against humanity, was and is feasible in Ethiopia. It is a trite fact that the criminalization of crimes against humanity has risen to the level of an *jus cogens* which imposes *erga omnes* obligation which means a non-derogable duty owed to all mankind.²⁰⁰ This means that the non-existence of a domestic law criminalizing crimes against humanity does not bar the investigation and prosecution of crimes against humanity as such, given that criminal liability for crimes against humanity has been recognized under the customary international law. Even if states have not ratified any treaties dealing with crimes against humanity, they have a duty to enforce peremptory norms before national courts. Therefore, to address the legal loopholes that exist in respect of crimes against humanity more effectively, the Ethiopian government could use (have used) customary laws to confer jurisdiction on its courts *ex post facto* without encroaching on the principle against retroactive application of law. Practically, this approach is not widely utilized, as domestic courts are reluctant to apply international law directly, especially in criminal matters. Therefore, the best scenario for a state is to domesticate core crimes as such, to obviate legislative inadequacies that impede the prosecution of core crimes in the same label and characterization.

¹⁹⁸ For a detailed discussion of this approach, see Heller 2012, pp. 202–48.

¹⁹⁹ For the discussion of the Charges, see *infra* Sect. 5.3.

²⁰⁰ Ambos 2014, pp. 39–40; Werle and Jessberger 2014, p. 330; Bassiouni 2013, p. 158; Cassese 2013, pp. 189–91; Schabas 2010, pp. 140–43; Bassiouni 1999; Cryer et al. 2010, pp. 236 *et seq*; Cassese 2002, pp. 355–356; Bassiouni and Wise 1995; Hanniken 1988, p. 285; Roht-Arriaza 1990, pp. 451–512; Parker 1988–1989; De Hoogh 1996, pp. 44–63; Zalaquett 1990; Ragazzi 2000; Christenson 1987–1988, pp. 585–648; Tam 2010; Bassiouni 1996a, b; Ragazzi 1999; Randall 1988; Scharf 1996, pp. 2–39; Goodwin-Gill 1991. See also Federal Court of Australia, *Nulyarimma v Thompson*, Judgment of 1 September 1999 §§ 18–21; Mitchell 2000, pp. 362–383; Peters 1999; Van Schaack 1999, pp. 787–850; Cassese et al. 2001, pp. 234–236.

3.3.3 War Crimes

War crimes, as one of the core crimes that entail direct individual criminal responsibility under international criminal law, were provided for under Articles 282 through to 295 of the Penal Code.²⁰¹ The Penal Code followed a content orientated structure in dealing with war crimes, that is, a taxonomy based on the laws of The Hague and Geneva.²⁰² Moreover, the Penal Code, rightly so, did not draw a distinction between war crimes in non-international and in international armed conflicts. Similar to other crimes, the elements of war crimes also consisted of material and subjective elements.

Under the *actus reus* of war crimes, there are two elements: the individual acts and the context in which such acts should be committed. In describing the context in which war crimes need to be committed, the Penal Code stated that war crimes might arise, ‘in time of war, armed conflict, or occupation.’²⁰³ To comprehend what constitutes an armed conflict, the case law of the ICTY is of a paramount importance. As defined by the ICTY Appeal’s Chamber ‘armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized groups or between such groups within state.’²⁰⁴ Since the Penal Code did not define what constitutes an armed conflict it is logical to adopt the definition above, because the Code defined war crimes by reference to international humanitarian law and custom. Following this definition, it is hardly possible to justify the need for the inclusion of the term ‘in time of war’ as a contextual element of war crimes under the Code.

²⁰¹ Cf. Articles 270 through 283 of the Criminal Code. And also see Article 8 of the Rome Statute, Article 28D of the African Court Statute, and the Geneva Conventions of 1949 and the Additional Protocols.

²⁰² Werle and Jessberger 2014, pp. 409–410. For detailed discussion and collection of materials on war crimes see Werle and Jessberger 2014, pp. 391 *et seq.*; Triffterer and Ambos pp. 297 *et seq.*

²⁰³ The Article read that: ‘Whosoever, in time of war, armed conflict, or occupation, organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions. ...’ Article 282 of the Penal Code.

²⁰⁴ *Prosecutor v Tadic* IT-94-I-A, 15 July 1999, § 70. See also Cullen 2010, pp. 117–142; Werle and Jessberger 2014, pp. 410–411; Moir 2004.

The other *actus reus* element of war crimes under the Penal Code is the commission of individual acts within the context of an armed conflict. These individual acts are: acts against civilians,²⁰⁵ acts against property,²⁰⁶ prohibited means and methods of warfare,²⁰⁷ Unlawful acts against the wounded, shipwrecked and sick²⁰⁸ as well as

²⁰⁵ Article 282 War crimes against the Civilian Population

Whosoever, in time of war, armed conflict or occupation, organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions:

- (a) killings, torture or inhuman treatment, including biological experiments, or any other acts involving dire suffering or bodily harm, or injury to mental or physical health; or
- (b) willful reduction to starvation, destitution or general ruination through the depreciation, counterfeiting or systematic debasement of the currency; or
- (c) the compulsory movement or dispersion of the population, its systematic deportation, transfer or detention in concentration camps or forced labor camps; or
- (d) forcible enlistment in the enemy's armed forces, intelligence services or administration; or
- (e) denationalization or forcible religious conversion; or
- (f) compulsion to acts of prostitution, debauchery or rape; or
- (g) measures of intimidation or terror, the taking of hostages or the imposition of collective punishments or reprisals; or
- (h) the confiscation of estates, the destruction or appropriation of property, the imposition of unlawful or arbitrary taxes or levies, or of taxes or levies disproportionate to the requirements of strict military necessity,

is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

²⁰⁶ Article 285 Pillage, Piracy and Looting.

Whosoever organizes, orders or engages in looting, piracy, pillage, economic spoliation or the unlawful destruction or removal of property on pretext of military necessity,

is punishable in accordance with Article 282. In addition, see Article 282(h) of the Penal Code.

²⁰⁷ Article 288 Use of illegal means of combat.

Whosoever uses, or orders to be used, against the enemy any means or method of combat expressly forbidden by international conventions to which Ethiopia is a party, or by the standing orders of the Ethiopian Army,

is punishable with simple imprisonment for not less than three months, or, if the offence is grave, with rigorous imprisonment from three years to life; in the gravest cases the offender is punishable with death.

²⁰⁸ Article 283 War Crimes against wounded, sick or shipwrecked persons.

Whosoever, in the circumstances defined above, organizes, orders engages in:

- (a) killings, torture or inhuman treatment or other acts entailing dire suffering or physical or mental injury to wounded, sick or shipwrecked persons, or to members of the medical or first-aid services; or
- (b) the destruction, rendering unserviceable or appropriation of supplies, installations or stores belonging to the medical or first-aid services, in a manner which is unlawful, arbitrary or disproportionate to the requirements of strict military necessity,

is punishable in accordance with Article 282.

prisoners of war and interned persons,²⁰⁹ were regulated, by the Penal Code as war crimes against protected persons.²¹⁰ The individual prohibited acts against those protected persons included killing, acts of torture, inhumane treatment, forcible transfer,²¹¹ denial of justice,²¹² hostage taking,²¹³ compelled service in the military operation or intelligence service,²¹⁴ unlawful confinement, denationalization or forcible religious conversion,²¹⁵ forced acts of prostitution, debauchery or rape.²¹⁶

War crimes against property were also criminalised under the Penal Code. The individual acts against property included confiscation of estate, pillaging, looting, piracy, destruction, or removal of property under military pretext.²¹⁷ Under the Code, arbitrary taxes, levies, or levies disproportionate to the requirements of strict military necessity are, oddly, regarded as a war crime against property.²¹⁸

The other categories of war crimes were those regulating prohibited means of warfare. The Code criminalized attacks against the civilian population,²¹⁹ attacks against civilian objects,²²⁰ willful starvation of civilians,²²¹ hostile acts against the International Red Cross or Red Crescent, abuse of emblems and insignia of humanitarian organizations, hostile acts against the bearer of the flag,²²² and other

²⁰⁹ Article 284 War Crimes against prisoners and interned persons.

Whosoever, in the circumstances defined above:

- (a) organizes, orders or engages in killings, acts of torture or inhuman treatment or acts entailing dire suffering or injury to prisoners of war or interned persons; or
- (b) compels such persons to enlist in the enemy's armed forces or intelligence or administrative services,

is punishable in accordance with Article 282.

Moreover, the Code criminalized commission of the following acts:

- (a) kills or wounds an enemy who has surrendered or laid down his arms, or who for any other reason is incapable of defending, or has ceased to defend, himself; or
- (b) mutilates a dead person; or
- (c) lays hands on or does violence to a wounded, sick or dead enemy on the field of battle, with intent to rob or plunder him; or
- (d) orders one of the above acts. Article 287 of the Penal Code. See also Article 292, which made maltreatment of protected persons punishable.

²¹⁰ Articles 283, 284 and 291 of the Penal Code.

²¹¹ Article 283(a) of the Penal Code.

²¹² Article 292 of the Penal Code.

²¹³ Article 282(g) of the Penal Code.

²¹⁴ Article 282(d) of the Penal Code.

²¹⁵ Article 282(e) of the Penal Code.

²¹⁶ Article 282(f) of the Penal Code.

²¹⁷ Articles 282(h) and 285 of the Penal Code.

²¹⁸ Articles 282(h) and 285 of the Penal Code.

²¹⁹ Article 282(a) of the Penal Code.

²²⁰ Article 282(h) of the Penal Code.

²²¹ Article 282(b) of the Penal Code.

²²² Articles 293 and 294 of the Penal Code.

means of warfare. Using methods of warfare expressly forbidden by Ethiopian law or international treaties ratified by Ethiopia is another category of war crimes under the Code.²²³ In general, the Penal Code included war crimes involving protected persons, property, and prohibited means and methods of warfare. With regard to the subjective elements, the general *mens rea* defined under the Code was *mutatis mutandis* applicable to war crimes—that is, committing the specified individual acts with intent and knowledge.²²⁴

3.4 Modes of Participation Under the Penal Code

The commission of crimes under international law normally involves a large number of individuals who participate at different levels and in differing degrees in the perpetration of the alleged crimes.²²⁵ Even when one person alone performs the acts that constitute the material elements of a core crime, the question of participation may arise since others might have assisted in its commission or master-minded the criminal design and set in motion its realization or simply used an agent who carries out the objective element as a mere tool. As famously stated by the IMT ‘[c]rimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.’²²⁶ To properly ascribe criminal responsibility and thereby impute an effective punishment to all levels of perpetrators, putting in place well-structured modes of criminal liability is very important.

Under the Penal Code, the participation of an individual in the commission of the crimes was divided into two parts, namely: Principal participation and Secondary participation.²²⁷ The new Criminal Code adopts the same approach.²²⁸ According to Article 32 of the Penal Code, a person was deemed to have acted in a

²²³ Article 288 of the Penal Code.

²²⁴ Articles 23, 58 and 59 of the Penal Code.

²²⁵ Werle and Jessberger 2014, pp. 193–194; Cryer et al. 2010, p. 361; Schabas 2011, pp. 214–215; Neubacher 2006, pp. 787–799; Harrendorf 2014, pp. 234–251.

²²⁶ IMT Judgment (1946), para 447. For a general discussion on individual criminal responsibility and the modes of participation in international criminal law, and a collection of relevant materials, see Triffterer and Ambos, 2016, pp. 978 *et seq*; Werle and Jessberger 2014, pp. 192 *et seq*; Ambos 2003, pp. 103 *et seq*.

²²⁷ Articles 32–39 of the Penal Code. Cf. Articles 32 *et seq* of the Criminal Code.

²²⁸ The Criminal Code substantially mirrors the modes of participation under the old Penal Code. Only minor changes in the usage of terms, and trivial additions, have been made in the new Criminal Code. For instance, see Article 32(1)(c) where the word ‘infant’ has been added. See also Article 32(3) where different words are used, although the substance is the same as its counterpart under the Penal Code.

principal capacity in any of the following three forms.²²⁹ First, a person was regarded as a perpetrator of the crime when he committed the material element of an offence personally.²³⁰ The determining criterion for this principal mode is carrying out the objective element of the crime. This includes indirectly committing the material element of the crime by using inanimate things, such as natural forces, and also using animals as a means.²³¹ This is similar, although not equivalent, to the mode of participation provided under Article 25(3)(a), first alternative, of the Rome Statute—the material offender or direct perpetrator.²³² When pluralities of persons carry out the objective elements of the crime they were regarded as co-(material) offenders.²³³ To be characterized as co-material offenders under the Code, all the perpetrators had to carry out the objective elements of the crime, although there was no legal requirement for their respective roles or contributions to be essential for the materialization of the crime. In addition, it was not necessary for the co-material offenders to have a common criminal plan, unlike in the case of joint perpetration. Under the Penal Code, when two or more persons personally carried out the material elements of the crimes, they were regarded as co-material offenders regardless of their degree of contribution and absence of a common criminal plan.

Secondly, the person was also regarded as a principal offender where he ‘fully associated himself with the commission’ and the intended result of the offence,

²²⁹ The provision reads as follows: Article 32.—Principal Act: Offender and Co-offenders

1. A person shall be regarded as having committed the offence and shall be punished as such if:
 - a. he actually commits the offence either directly or indirectly, for example by means of an animal or a natural force; or
 - b. he without performing the criminal act itself fully associates himself with the commission of the offence and the intended result; or
 - c. he employs a mentally deficient person for the commission of an offence or knowingly compels another person to commit an offence.
2. (...)

The modes of participation under the new Criminal Code are congruent with the ones in the above-quoted Article of the Penal Code. *Cf.* Article 32 of the Criminal Code.

²³⁰ Article 32(1)(a) of the Penal Code.

²³¹ Article 32(1)(a) of the Penal Code. Same wording is transposed to the new Criminal Code. *Cf.* Article 32(1)(a) of the Criminal Code.

²³² For summary on modes of participation under international criminal law, see Triffterer and Ambos 2016, pp. 979–1030; Werle and Jessberger 2014, pp. 192–224; Cassese 2013, pp. 161–198; Ambos 2013, pp. 144–176; Bassiouni 2013, pp. 325–331; Schabas 2011, pp. 224–230; Sung 1992.

²³³ Article 32(1)(a) with Article 32(3) of the Penal Code. *Cf.* Article 32(1)(a) with Article 32(3) of the Criminal Code.

though he did not personally carry out the material element of the crime.²³⁴ These are moral offenders or persons who are the masterminds or the working brains of the commission of the crime—individuals in the background or behind the scenes of the commission of crimes. Based on the wording of subparagraph (b) a moral offender could take two forms: Co-(moral) perpetrator and indirect perpetrator.²³⁵ Hence, it is two-pronged. On the one hand, this is similar to the joint commission (joint perpetration or co-perpetration) that is enunciated under the Rome Statute.²³⁶ On the other, it is similar to perpetrator-behind-perpetrator or indirect perpetration.²³⁷ This can be a modified form of joint commission when the moral offender has an essential role for the materialization of the common criminal design and the other co-offender performs the objective elements of the crime. In other words, the essential role of the moral offender in such a case is not carrying out the objective element of the crime; instead, it should be other essential task, which is pivotal for the actualization of the common criminal plan. Thus, this makes the two co-perpetrators.²³⁸ This mode could not be addressed under subparagraph (a) of the Penal Code because it required personal perpetration of the material elements. In other words, Article 32(1) subparagraph (a) applies when a perpetrator is a material offender or the co-perpetrators are all material offenders. Also, the presence of a common plan was not a requirement to be co-material offenders. The terms ‘fully associate himself with the commission of a crime’ could include the perpetrator-behind-perpetrator. The person could fully associate himself with the

²³⁴ Article 32(1)(b) of the Penal Code. The new Criminal Code used the same wording. *Cf.* Article 32(1)(b). As Graven puts it ‘to associate oneself mentally with the commission of an offence does not mean that one merely hopes for the doer’s success, that one participate only spiritually in the offence, for the punishment would then be unjustified. If the moral offender is punishable, therefore, it is because, although he takes no part in the material perpetration of the offence, he commits the offence in the sense that he fully sides with the material offender and adopts as his own the offence and the desired result.’ Graven 1965, p. 94. But it is not meant to exclude essential contributions by the moral offender, which do not involve perpetration of the material element.

²³⁵ Article 32(1)(b) with Article 32(3) of the Penal Code.

²³⁶ Article 25(3)(a), second alternative, of the Rome Statute.

²³⁷ *Cf.* Article 25(3)(a), third alternative, of the Rome Statute.

²³⁸ Articles 32(1)(b) with Article 32(3). It can be said that the person who carried out the objective elements is a material offender under Article 32(1)(a), whereas the moral offender with an essential role to play falls under Article 32(1)(b). However, for the sake of clarity and to avoid unnecessary complication, this kind of scenarios should be considered and understood as involving co-offenders—the equivalence of joint commission under international criminal law. Otherwise, charging the two offenders with different modes under the above subparagraphs would not only be technically sophisticated but also delink the course of events in which the offenders commit the crime. The fact that they design the criminal plan together and essentially contribute to the realization of same should make them co-perpetrators. By advancing such interpretation, it is apt to consider them as co-offenders. Admittedly, the modes under the Penal Code and the new Code have not been refined and clarified by the case law. Even in the Red Terror trials, although there was a pressing need to do so, the court failed, and missed the opportunity, to refine and clarify the modes of participation.

commission of the crime by using a responsible intermediary (or person) to carry out a criminal plan. Put otherwise, the moral offender could be an indirect perpetrator by exercising a functional domination of, or effective control, over the commission of the crime²³⁹ or the means (in this case a responsible material offender) who carries out the objective elements of the crime that the former has masterminded. The following determining elements make the moral offender an indirect perpetrator: (i) For being the will and mind of the material offender—he is

²³⁹ As regards modes of criminal liability, there are differentiated and unitary models. In the latter case, the modes are not necessarily categorized into various forms, such as, primary and secondary modes, and other subcategories. The reason is that such categorization is inconsequential. In other words, same form of punishment is applied across the board, irrespective of the mode and degree of participation. Whereas, according to the differentiated model, which is, relatively, a widely accepted approach, the modes of participation are categorized into different forms, which will then have an implication at the sentencing stage. Even if it does not, the approach advocates compartmentalization of the modes and degrees of participation by which individuals participate in the commission of crimes. In this model, where there are different categories of modes of participation, distinguishing one mode from the other is important. There are three approaches that can help to do so, namely, the objective, subjective and control theories. According to the objective theory, principal perpetrators are those who carry out the objective elements of the crime, whereas for the subjective theory what matters is not who carries out the objective elements of the crime, but who possesses the relevant subjective element (attitude). As aptly observed, ‘if a person has the mind of a perpetrator (*animus auctoris*), he will be treated as a principal regardless of the importance of his factual contribution; if he only wishes to help another person commit the crime (*animus socii*), he will be convicted as an aider and abettor even if he personally fulfils every element of the definition of the crime.’ Weigend 2011, p. 95. For the control theory, which was developed by the German scholar, Claus Roxin, the distinguishing criterion between principal and accessory is not based on a pure test of who carried out the *actus reus* or possessed the subjective attitude. Instead, the defining factor is functional domination or control over the commission of the act. Based on the wording and the modes of participation provided under the Penal Code, it is convincing to conclude that the latter theory is the best to explain how the modes of participation are differentiated in Ethiopia. The subjective theory could not be used because, based on this theory, a material offender under Article 32(1)(a) can hardly be regarded as a principal offender. Moral offenders, as opposed to the objective theory, were regarded as principal offender under the Penal Code. Thus, based on the wording of the Penal Code a merely subjective or objective criterion is not sufficient to distinguish modes of participation under the Code. The terminology and classification of modes under the Codes warrant adoption of the control theory. Using a pure subjective or objective criterion would be misreading the intention of the drafters. Distinguishing modes of participation is important and necessary, not necessarily for punishment, but to fulfil the legal elements of an indictment. Article 111 of the Criminal Procedure Code. As a rule, principal and secondary modes of participation are punishable with same (forms of) punishment. See Articles, 35 and 36 of the Penal Code. From this point of view, differentiating the modes might be inconsequential or of lesser importance. On the Claus Roxin Control Theory and for a general discussion of these issues in international criminal law, see Roxin 2011, pp. 191–205; Fletcher 2012, pp. 1029–1044; Werle and Jessberger 2014, p. 198; Ambos 2013, pp. 146 *et seq*; Triffterer and Ambos 2016, pp. 987 *et seq*; Weigend 2011, p. 95; Vest 2014, pp. 295–309; Gil and Maculan 2015, pp. 351 *et seq*; Wirth 2012, pp. 980 *et seq*; Werle and Burghardt 2014, pp. 301–318; Jessberger and Geneuss 2008, pp. 855 *et seq*; van der Wilt 2009, pp. 308–314; Jain 2011, pp. 179–190; Stewart 2012, pp. 165–218; Werle 2007, pp. 953–975; Goy 2012, pp. 1–70. See also Ohlin 2014, pp. 325–343; Ohlin 2012, pp. 771–797; van Sliedregt 2012, pp. 1171–1188; Weigend 2014, pp. 253–266.

the one who designs the criminal plan; and (ii) For exercising effective control over the material offender. The material offender is simply an instrument for the moral offender, as the latter controls his will; but this is not to say that the material offender is necessarily free from criminal responsibility. The form of indirect perpetration under subparagraph (b) of Article 32(1) was restricted to a situation where the moral offender uses a criminally responsible agent, because using other means, such as an infant or irresponsible agent, is covered under subparagraph (c) of the same provision.

Thirdly, a person was deemed to be a principal offender under the Penal Code when he committed a crime, using an irresponsible person like a legally insane person as an instrument, or by compelling another person to commit the offence.²⁴⁰ This is a sort of indirect perpetration, however, under Ethiopian law (both under the Penal and Criminal Codes), is recognized narrowly—a narrower form of commission through another person. It is not clear why the law delimited the means under Article 32(1)(c) only to innocent agents. From the vantage point of the indirect perpetrator, the legal status (or culpability) or otherwise of the intermediary is irrelevant. Although the means listed under subparagraph (c) are the classical intermediaries that could be used by the indirect perpetrator, the latter could also equally use a responsible agent(s) to commit crimes. This is particularly true in a hierarchically organized structure. As shown above, the latter case could be addressed under subparagraph (b), but such distinction based on the means employed by the indirect offender should have been avoided under the Penal Code and the new Criminal Code should have remedied this blind spot.²⁴¹ Where two or more persons committed a crime as principal offenders, they would be held culpable as co-offenders.²⁴²

For the principal offenders to incur criminal liability, the actual commission of the core crimes is not necessary; attempt suffices.²⁴³ In principle, the offenders who attempted to commit crimes were and still are subject to the same punishment as

²⁴⁰ Article 32(1)(c) of the Penal Code. Using ‘an infant’ as innocent intermediary to commit a crime is added to the list of means under the new Criminal Code. Cf, Article 32(1)(c).

²⁴¹ However, this is not to say that the indirect perpetrator who uses a responsible agent could escape legal responsibility. Besides, the modes under Article 32(1)(b) of the Penal Code (or Article 32(1)(b) of the Criminal Code), the indirect perpetrator could be punished as an instigator, an accomplice or other accessorial modes. Although in terms of punishment, it is not necessarily more lenient than for principal modes, it is apt to properly characterize the mode of participation and ascribe proper punishment. Since there is a possibility that principal offenders could receive a more severe punishment than the secondary participant. The moral condemnations of the two modes is also not of the same weight.

²⁴² Articles 32(3) and 34 of the Penal Code.

²⁴³ The Penal Code stated that ‘[w]hoever intentionally begins to commit an offence and does not pursue or is unable to pursue his criminal activity to its end, or who pursues his criminal activity to its end without achieving the result necessary for the completion of the offence shall be guilty for an attempt an attempt.

The offence is deemed to be begun when the act performed clearly aims, by way of direct consequence, at its commission.’, Article 27(1) of the Penal Code.

perpetrators.²⁴⁴ As a matter of principle, preparatory acts were not punishable under the Penal Code.²⁴⁵ They were punishable only when ‘in themselves they constitute an offence defined by law; or they are expressly constituted a special offence by law by reason of their gravity or the general danger they entail.’²⁴⁶ Owing to the gravity of the crimes, the Code in the Special Part explicitly criminalized preparatory acts to commit genocide and war crimes.²⁴⁷ Therefore, under Ethiopian law preparation to commit core crimes was and still is punishable. Moreover, the Penal Code recognized accessorial modes of participation. One category of accessorial modes of participation was incitement or instigation; inducing a person to commit an offence.²⁴⁸ As a matter of principle, incitement was (and is still) not punishable unless the offence was attempted.²⁴⁹ However, in the case of core crimes, provocation to commit the crimes was criminalized as an independent crime.²⁵⁰ That means mere provocation or incitement was (and is still) punishable. Thus, incitement to commit core crimes is not a mode, instead, it is a crime in its own right. Interestingly, the Penal Code did not only criminalize incitement to commit genocide but also provocation to commit war crimes, unlike under international criminal law.²⁵¹

Assistance or complicity is another accessorial mode of participation in the commission of core crimes or any other crimes for that matter.²⁵² Within the meaning of the Code, an aider or an accomplice was whosoever intentionally gave to another person any kind of aid before or while an offence was being

²⁴⁴ On the punishability of attempt, the Code read ‘... (2) An attempted offence is always punishable save as is otherwise provided by law. A mere attempt to instigate or participate in an offence does not come within the provisions of the law unless it is expressly provided to the contrary.

(3) In the ease of an attempted offence the offender will be liable to the punishment attaching to the offence he intended to commit:

Provided that if circumstances so justify the court may reduce the punishment within the limits provided by law. (Article 184).’ Article 27(2)(3) of the Penal Code.

²⁴⁵ The general part of the Code unequivocally enunciated that ‘[a]cts which are merely designed to prepare or make possible an offence by procuring the means or creating the conditions for its commission are not punishable ...’, Article 26 of the Penal Code.

²⁴⁶ Article 26 of the Penal Code. Cf. Article 26 of the Criminal Code.

²⁴⁷ Article 286 of the Penal Code.

²⁴⁸ Article 35 of the Penal Code.

²⁴⁹ ‘Whosoever intentionally induces another person whether by persuasion, promises, money, gifts, threats or otherwise to commit an offence shall be regarded as guilty of having incited the commission of the offence.

The person who incited the commission of an offence shall be liable to punishment provided the offence was at least attempted.’ Article 37(1) of the Penal Code. Cf. Article 36 of the Criminal Code.

²⁵⁰ Article 286 of the Penal Code. Cf. Article 274 of the Criminal Code.

²⁵¹ For discussion on the status of incitement to commit core crimes under international criminal law, see Ambos 2013, pp. 132, 170. So far it is recognized only for genocide, not other core crimes.

²⁵² Article 36 of the Penal Code.

committed.²⁵³ Giving assistance after the offence had been committed was also another accessorial mode of participation called accessory after the fact.²⁵⁴ Pursuant to the Code, conspiracy to commit serious crimes also entailed criminal liability in some cases, as in the case of genocide and war crimes.²⁵⁵ In other cases where the law did not state conspiracy as a mode of participation in the crimes, conspiracy served only as an aggravating ground. Nevertheless, conspiracy to commit genocide or war crimes was and still is laudably criminalized in Ethiopia, which is not the case in the contemporary international criminal law treaties.²⁵⁶

The other point related to the modes of participation in the commission of core crimes was command responsibility. The idea of command responsibility was and is still not recognized in a wider manner in Ethiopian law. The provision of the Penal Code, which regulated command responsibility stated that

in the case of an act committed by a subordinate on the express order of an administrative or military superior who was competent so to do, the person who gave the order is responsible for the crime committed and is liable to punishment, where the subordinate's act constitutes a crime and did not exceed the order given (Article 58 (3)).²⁵⁷

From this, it is clear that a superior was not responsible for the core crimes committed by their subordinates due to his failure to exercise adequate control over the subordinates under his effective control. Nor was he responsible for failure to punish the subordinate for the wrongs they had done. However, the notion of superior or command responsibility under international law is not meant to cover cases where the superior gives instructions to his subordinates to commit crimes, for this falls under commission through another person or ordering, depending on the degree of control. Command responsibility in its broader sense is intended to cover cases where the superior failed to prevent the commission of the alleged crimes by his subordinates or failed to take measures against the perpetrators after the commission of the crimes—it is regarded as a dereliction of duty which is a kind of

²⁵³ Article 36 of the Penal Code.

²⁵⁴ Article 39 of the Penal Code.

²⁵⁵ As stipulated in the Code '[w]here two or more persons enter into an agreement to achieve an unlawful design or to commit an offence the provision regarding participation and aggravation of punishment due to the abovementioned circumstances are applicable. Article 81(d)

(2) The foregoing provision shall, however, not affect the provision contained in the Special Part of the Code relating to conspiracy against the essential interest of the State and defence, the forming of unlawful associations and the participation therein as well as to the organization of gangs or unlawful wrongdoers (Article 269, 286, 313 and 472).' Articles 37 and 286 of the Penal Code.

²⁵⁶ For instance, the Rome Statute does not criminalize conspiracy to commit core crimes. For a general discussion on conspiracy, see Okoth 2014.

²⁵⁷ Articles 69 and Article 70(3) of the Penal Code. Cf Article 73 of the Criminal Code and Article 28 of the ICC Statute.

dereliction offence.²⁵⁸ Nevertheless, under Ethiopian law, a superior is responsible only for the crimes committed by his subordinates upon his express order. Unless there is a proof of such an express order by a superior to subordinates, the superior would not be held responsible for the core crimes committed by his subordinates. Basically, what was included under the caveats was a form of ordering²⁵⁹ and not command responsibility as such. Ordering as included under the Penal Code and also the new Criminal Code is very narrow as it requires an explicit order.

The Penal Code stated unequivocally that a superior order is not a defence for the subordinates but it could be used as a ground for the mitigation of punishment.²⁶⁰ In very exceptional scenarios, a superior order could exempt the subordinates from liability.²⁶¹ It was enshrined in the Code that ‘the Court may impose no punishment where, having regard to all the circumstances and in particular to the stringent exigencies of State or military discipline, the person concerned could not discuss the order received and act otherwise than he did.’²⁶² Other than these limited, practically impossible cases, in which the subordinates could not discuss the matter with their superior, the superior order was and still is not a defence.²⁶³

The Penal Code did not recognize criminal responsibility of juridical persons who participated in the perpetration of core crimes. There was a notion of juridical persons’ responsibility under the Penal Code.²⁶⁴ However, this did not apply to all the crimes included under the Penal Code; it applied only to the specific crimes for which the Code expressly recognized liability of juridical persons. The Code did not recognize criminal responsibility of artificial persons in the cases of core crimes. The new Criminal Code should have rectified this.²⁶⁵ Corporate criminal liability in

²⁵⁸ For a summary and additional sources, see Triffterer and Ambos 2016, 1056–1106; Werle and Jessberger 2014, pp. 221–233; Ambos 2013, pp. 181–232; Cryer et al. 2010, pp. 387–400; Nerlich 2007, pp. 665–682; Bonafe 2007, pp. 599–618; Slidregt, pp. 420–432; Sivakumaran 2012, pp. 1129–1150; Meloni 2007, pp. 619–637; Karsten 2009, pp. 983–1004; Vetter 2000, pp. 90–110; Ronen 2010.

²⁵⁹ For discussions on ordering as a mode under international criminal law, see Ambos 2013, p. 163; Werle and Jessberger 2014, pp. 214–215; Cryer et al. 2010, pp. 377–378; Goy 2012, p. 50.

²⁶⁰ Article 70(1) of the Penal Code. Cf. see also Cassese 2013, pp. 182–192; Gaeta 1999, pp. 172–191; Levie 1991, pp. 269–291; Schabas 2011, pp. 231–237.

²⁶¹ Article 70(2) of the Penal Code.

²⁶² Article 70(2) of the Penal Code.

²⁶³ This means that whenever the subordinates were able to discuss the nature of the acts, they were required to do so and to refuse to execute illegal orders. Otherwise, blindly executing illegal orders of the superiors would not be inconsequential.

²⁶⁴ Articles 567 and 576 of the Penal Code. See also Graven 1961, p. 58.

²⁶⁵ Admittedly the new Criminal Code provides a general provision which deals with participation of juridical persons in the commission of crimes. It also defines the categories of juridical persons which can be held responsible for participating in the perpetration of crimes. In this regard it is progressive. However, it should have extended corporate (or juridical person’s) responsibility to the perpetration of core crimes. See Articles 23(3), 34, 46, 90, 142, 326, 329, 352, 354, 355, 427, 485, 513, 524, 530, 573, 585, 599, 607, 609, 632, 638, 645, 698, 701, and 716 of the Criminal Code. For criminal liability of legal persons in the cases of petty crimes, see Articles 740(3), 752 (4), 768, 770, 777, and 839 of the Criminal Code.

the case of serious crimes, such as core crimes, is a pressing need that should be recognized by the Ethiopian legal system.²⁶⁶

To sum up, the Penal Code adopted a differentiated model of modes of participation as opposed to a unified or monist model of participation. Accordingly, principal offenders (perpetrators) and accessorial offenders were recognized as two broad categories of modes of individual criminal responsibility. As a matter of rule, the perpetrators, instigators, those who issue an order, and others were subject to the same punishment. The new Criminal Code retains the modes of participation under the Penal Code. It should have remedied some of the blind spots of the Penal Code as regards the modes of participation and criminal liability of juridical persons for participating in the perpetration of core crimes.

3.5 Defenses

All legal systems recognize the notions of defenses and justifications, which can preclude criminal liability. The recognition of defenses and justifications for offences is not limited to domestic law. Under the statutes of international courts, defenses that can exculpate the perpetrators from culpability are also expressly recognized.²⁶⁷ The Penal Code of Ethiopia generally recognized some defenses (excuses and justifications) for crimes. Perpetrators of core crimes could also raise those defenses. The plausible defenses for perpetrators of core crimes under the Penal Code, included insanity,²⁶⁸ irresistible coercion,²⁶⁹ necessity,²⁷⁰ mistake of fact,²⁷¹ and legitimate self-defense.²⁷² Infancy was also one of the grounds which could preclude criminal liability for core crimes under the Penal Code.²⁷³ Infants, in the wording of the Penal Code, were those who had not attained the age of nine

²⁶⁶ Article 46C of the Statute of the African Criminal Court recognizes corporate criminal liability. For general discussions on corporate criminal responsibility for core and transnational crimes in international criminal law, see Colvin 1995, pp. 1–44; Nerlich 2010, pp. 895–908; Farrell 2010, pp. 873–894; Crady 1996, 1053–1064; Kaleck and Saage-Maass 2010, pp. 699–724; Stessens 1994, pp. 493–520; Stewart 2014, pp. 121–206; Bernaz 2015, pp. 313–330; Kyriakakis 2016.

²⁶⁷ See Articles 22–33 of the Rome Statute. See also Ambos 2011, pp. 299–329; Bassiouni 2013, pp. 401–473; Cassese 2013, pp. 209–214; Schabas 2011, pp. 238–247; Darcy 2011, pp. 231–242; Bohlander et al. 2006.

²⁶⁸ Articles 48–51 of the Penal Code.

²⁶⁹ Articles 66–68 of the Penal Code.

²⁷⁰ Article 71 of the Penal Code.

²⁷¹ Article 76 of the Penal Code.

²⁷² Article 74 of the Penal Code. For summary on self-defense, see generally Schabas 2005, pp. 314 *et seq*; Cassese 2013, pp. 209–240; Bassiouni 2013, pp. 401–473; Werle and Jessberger 2014, pp. 234–238; Knoops 2008; Ambos 2011, pp. 299–329; and Cryer et al. 2010, pp. 402–420.

²⁷³ Article 52 of the Penal Code.

years. They were not deemed to be criminally responsible.²⁷⁴ Infants were exonerated absolutely from any criminal liability because punishing them by no means helps to address the very purpose of punishment. But when a young person, between the ages of nine and 15, committed core crimes, he would be subjected, not to the ordinary penalties applicable to adults, but to special measures, such as, school or home arrest or a term in a corrective institution.²⁷⁵ The trials in which young persons below the age of 15 were accused required by law to be held separately, and young person should not be tried together with adults.²⁷⁶ All persons over the age of 15 who perpetrated core crime were criminally liable, but those over the age of 15 but under 18 could invoke their age as a ground for mitigation of punishment.²⁷⁷ The Penal Code also recognized general aggravating²⁷⁸ and mitigating grounds,²⁷⁹ which were also applicable to the core crimes.

3.6 Penalties

Under Ethiopian criminal law, punishments for the crimes are outlined in the Special Part of the Code. In the Penal Code, there were two categories of punishment, namely, primary²⁸⁰ and secondary.²⁸¹ The penalties took different forms ranging from fines, confiscation, and/or deprivation of some political rights, imprisonment, to capital punishment. The law usually stated the minimum and maximum prison sentences that could be imposed on the convict for the crime committed. Similarly, the Penal Code outlined the sentences to be meted out for the perpetrators of core crimes under the respective specific provisions of the core crimes. Accordingly, perpetrators (instigators and other accessories included) who were found guilty of committing core crimes by a court of law were punishable with 'rigorous imprisonment from five years to life, or, in cases of exceptional gravity, by death.'²⁸² There were additional criteria that had to be met before the death penalty was imposed. These were that the offence should be completed, it should not be an attempted offence; the criminal should attain the age of 18 years at the

²⁷⁴ Article 52 of the Penal Code.

²⁷⁵ Article 53 of the Penal Code and Article 5 of the Criminal Procedure Code.

²⁷⁶ Article 5 of the Criminal Procedure Code.

²⁷⁷ Article 54 of the Penal Code.

²⁷⁸ Articles 188–93 of the Penal Code.

²⁷⁹ Articles 184–187 of the Penal Code.

²⁸⁰ The primary or principal punishments included penalties entailing loss of liberty, the death penalty, compulsory labour, confiscation of property, and a fine; see Articles 88–116 of the Penal Code. Cf. Articles 90–120 of the Criminal Code.

²⁸¹ Those included reprimand, caution, apology, admonishment, dismissal, and deprivation of rights, see Articles 120–127 of the Penal Code. Cf. Articles 122–128 of the Criminal Code.

²⁸² Articles 281 and 282 of the Penal Code.

time of the commission of the offence; and there should not be extenuating circumstance (s).²⁸³ These were cumulative conditions.

Provocation and preparation to commit core crimes were punishable by lesser sentences, that was rigorous imprisonment not exceeding five years.²⁸⁴ The law also prescribed the method for determining and calculating the sentence.²⁸⁵ Furthermore, the factors that could be considered as mitigating and aggravating grounds were provided illustratively under the Penal Code.²⁸⁶ The new Criminal Code, more or less, prescribed similar punishments for perpetrators of core crimes.

3.7 Interim Conclusion

Under the 1957 Penal Code, two categories of core crimes were codified as crimes against the law of nations, namely, genocide and war crimes. The Penal Code defined genocide in a broader manner as regards the categories of protected groups. Accordingly, political groups were included under the Code as one of the protected groups from acts of genocide. Under the idiosyncratic provision of the Penal Code, genocide has acquired an elastic meaning with respect to the protected groups. Hence, politicide was criminalized as genocide.

Other than this, the structural elements of the crime of genocide under the Penal Code were congruent with Articles 2 and 4 of the Genocide Convention. Under the Penal Code, modes of criminal responsibility and grounds that exclude criminal responsibility were enshrined in the general part of the Code, which is also *mutatis mutandis* applicable to core crimes. The Code also provided the minimum and maximum ranges of punishment for perpetrators of core crimes. The sentencing tariffs for perpetrators of core crimes range from five years to life imprisonment, and in exceptionally grave cases, capital punishment was imposed. The 2004 Criminal Code, which repealed the 1957 Penal Code, retained all of the provisions on core crimes without significant modification.

²⁸³ Articles 116–118 of the Penal Code. Cf. Article 117 of the Criminal Code.

²⁸⁴ Article 286 of the Penal Code.

²⁸⁵ Articles 85–87 of the Penal Code. The Code plainly stated that ‘...The penalty shall be determined according to the degree of individual guilt, taking into account the dangerous disposition of the offender, his antecedents, motive and purpose, his personal circumstances and his standard of education, as well as the gravity of his offence and the circumstances of its commission.’ Hence, the penalty should be tailored to fit the factors outlined under the law. Article 86 of the Penal Code. Cf. Articles 88–89 of the Criminal Code. In relation to calculation of the sentence the Penal Code succinctly stated that [i]n passing a sentence with deprivation of personal liberty, the Court shall specify what period of remand shall be deducted from the period of the sentence; Provided that no such deduction shall be made or a deduction for a limited period shall be made if such remand or a prolongation thereof is attributable to the offender. See Article 114(1) of the Penal Code.

²⁸⁶ Articles 79–84, and 184–193 of the Penal Code. Cf. Articles 82–86.

Therefore, the imperfections or deficiencies of the Ethiopian law were not of such a magnitude as to bar the prosecution of *Derg* officials. The only legal challenge that the Ethiopian government had was in the realm of crimes against humanity. These crimes were, and still are, not criminalized as such under Ethiopian criminal law. However, this does not mean that such gap was and is unbridgeable. To rectify the legislative deficiencies regarding crimes against humanity, customary international law could be or could have been invoked to prosecute crimes against humanity as such. As will be shown in the following chapters, the SPP resorted to the ordinary crimes approach to enable the prosecution of the individual acts of crimes against humanity.

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Chapter 4

The Ethiopian Approach to Reckon with *Derg* Crimes: The Road to the Creation of the Special Public Prosecutor's Office



Abstract The Transitional Government of Ethiopia did not turn a blind eye to the violations committed by the *Derg* regime. No matter how incomplete or incomprehensive the approach(es) it adopted might have been, the Transitional Government made a policy decision to reckon with *Derg* crimes. This chapter seeks to address the approach(es) that Ethiopia charted to confront the *Derg*'s past. It also presents the transitional justice mechanisms which are available at the disposal of transitioning states to reckon with evils of past.

Keywords Transitional justice mechanism • Prosecution • Truth commission • Reparation • The Special Public Prosecution Office • Ethiopia • *Derg* crimes • Mandates

4.1 Overview of the Strategies to Confront a Repressive Past

Before outlining the approach that the Transitional Government of Ethiopia opted for, it is judicious to shed light on the plausible transitional justice mechanisms that are available to transitioning states in their attempt to reckon with a repressive past. In the recent past, deeply embedded undemocratic and repressive modes of rule in Africa, Latin America, Eastern Europe, and Asia have given way to relatively democratic civilian governments.¹ Similarly, lengthy horrific civil wars, conflicts,

¹ Kritz 1995a; Stan and Nedelsky 2013a; Rwelamira and Werle 1996; Popovski and Serrano 2012; Ambos et al. 2009; Elster 2004; Werle 2006; Mallinder 2008; Sriram 2004; Verdoolaege 2008; Hayner 1994, pp. 597–655; Hayner 2001; Boraine et al. 1995; O'Donnell et al. 1986; Bassiouni 2000; Zalaquett 1992, pp. 1425–1438; Werle and Vormbaum 2012, pp. 298–232; Aukerman 2002, pp. 40–97; Minow 1998.

or civil strife that wreaked havoc in several countries, Ethiopia included, came to an end. Unfortunately, the Planet Earth is still saddled with conflicts and atrocities: In some places, such as, the youngest Africa nation, South Sudan, as well as in the Democratic Republic of Congo, Syria, and Yemen, horrific conflicts are causing an incalculable number of human casualties.² In the contemporary transitions, civilian uprisings of the so-called 'Arab spring' have resulted in a change of regimes in Northern African countries.³ Thus the transition from repressive regimes or conflict is still with us and cannot be said to be a thing of past.

The displaced dictatorial regimes and the conflicts were mostly characterized by egregious human rights violations. Following the transition, be it from a dictatorial regime or disastrous civil war, the nascent democracies, and newly installed government, are, more often than not, faced with formidable and complex challenges of how to confront the past.

How should newly installed governments deal with the crimes of the predecessor regimes or with violations that occurred during internal conflicts if not dealing with the past is no longer a viable option? Not so long ago, several countries across the globe were confronted with this formidable challenge, namely, how to deal with the evils of a demoniacal past: Argentina, Chile, Guatemala, Ecuador, Brazil, South Africa, Rwanda, Ethiopia, Sierra Leone, Kenya, Germany, Greece, France, and many others.⁴

It is becoming less debatable that the nascent democracies should deal with their recent oppressive pasts by employing appropriate transitional justice mechanisms. In other words, ignoring gross human rights violations and attempting to close the chapter of an oppressive dictatorial past by saying let bygones be bygones, is not anymore a viable option to start a journey on the road to a democratic future.⁵ In short, past gross human rights violations should not be left unconfronted for to bury egregious past wrongs is an undesirable option.

² On the Syrian crisis, see BBC News 2016 available at <http://www.bbc.com/news/world-middle-east-26116868>. Accessed 20 March 2016, Van Dam 2011; Lesch 2012; Starr 2012. On the Conflict in Yemen, see New York Times 2015 available at <https://www.nytimes.com/interactive/2015/03/26/world/middleeast/yemen-crisis-explained.html?mcubz=0>. Accessed 16 April 2016, Al Jazeera 2015, Yemen Crisis Explained, available at <http://www.aljazeera.com/news/middleeast/2015/01/yemen-crisis-201512010294461878.html>. Accessed 30 March 2016.

³ Lamont et al. 2015; Dabashi 2012.

⁴ See generally Kritz 1995b; Stan and Nedelsky 2013b; Bassiouni 2000; O'Donnell et al. 1986; Roht-Arriaza and Mariezcurrena 2006; Werle 2006.

⁵ Stan and Nedelsky 2013a, pp. 224–229.

The successor regime needs to tackle the horrors of the past in order to re-humanize the victims, establish the historical truth, end impunity, and restore the rule of law. What is more, the transition state has an obligation to investigate and prosecute the alleged perpetrators of gross human rights violations, and thereby nurture an awareness of the need to respect human rights, to establish sustainable peace, democracy, and stability.⁶ Unless past injustices are faced and addressed properly, the embers of the recent past injustices can ignite the fire of tomorrow's renewed conflict.⁷

Thus, addressing the repressive past is no longer optional but imperative. It is undeniable that in some cases timing or sequencing is necessary so as not to provoke the ire of the defunct powerful wrongdoers who have the potential to destabilize the fragile democracy.

Nonetheless, dealing with the repressive past is not an option to displace without any risk.⁸ The question then boils down to what choices are available to the new *Rechtsstaat* when confronting the evils of the past?

Just as the nature, causes and circumstances of conflicts or dictatorial regimes, from which transition⁹ ensued, vary, so do the available transitional justice mechanisms.¹⁰ Diverse ranges of strategies or transitional justice

⁶ Kritz 1995a; Stan and Nedelsky 2013b, pp. 7–9; Bassiouni 1999a, b, c, pp. 25–28; Roht-Arriaza 2006, pp. 3–14.

⁷ Bassiouni 1999a, b, c, p. 26.

⁸ Bassiouni 1999a, b, c, pp. 25–26; Stan and Nedelsky 2013a, pp. 225–226.

⁹ On what transition means or to what a state is transitioning to, see generally O'Donnell et al. 1986. Accordingly, transition is defined as 'an interval between one political regime and another. Transitions are delimited, on the one side, by the launching of the process of dissolution of an authoritarian regime and, on the other, by the installation of some form of democracy, the return of some form of authoritarian rule, or the emergence of a revolutionary alternative. The typical sign that the transition has begun comes when these authoritarian incumbents, for whatever reason, begin to modify their own rules in the direction of providing more secure guarantees for the rights of individuals and groups.' See O'Donnell et al. 1986, p. 6. Huntington puts it succinctly that transition can also result from a transformation by the incumbent government—this is a case when the government on power opens up things and starts the democratization process. In other words, 'the authoritarian regimes in power take the lead and play the decisive role in ending that regime and changing it into democratic system.' Such transition for example happened in Brazil; see Huntington 1995, p. 65.

¹⁰ Defining the concept transitional justice is difficult because of the interdisciplinary nature of the concept and diverse sets of transitional justice mechanisms that make the concept slippery. It can however be defined as a 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes', see Teitel 2003, p. 69. Roht-Arriaza criticized this definition as problematic; and she defined the concept as a 'set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.' See Roht-Arriaza 2006, pp. 1–2. For Kritz, transitional justice is a set of measures that emerging democracies undertake to reckon with crimes of former regimes, see generally Kritz 1995a. For a summary, see Werle and Jessberger 2014, p. 84.

mechanisms¹¹ are available as options for the successor elites in confronting their repressive pasts.¹² These range from prosecutions (criminal accountability), establishing a truth commission, setting in motion a process for lustration,¹³ making

¹¹ Different labels or descriptive phrases are used to refer to the notion of transitional justice. The nomenclature include: 'Post-conflict justice', 'post-transition justice', 'post authoritarian (totalitarian) justice', 'retributive justice' and 'justice after transition'. Some of these phrases or terminologies delimit narrowly the nature of the transition and/or the sets of mechanisms available to reckon with the legacies of a repressive past. For instance, post-conflict justice as a descriptive phrase of transitional justice limits transitions only to those related to armed conflict. A case of 'massive repression by the government against its own unarmed people' is excluded by the usage of post conflict justice, Roht-Arriaza 2006, pp. 1–2; Werle and Jessberger 2014, p. 84, footnote 483; Hayse 1995, p. 339; Bassiouni 2000, p. xv. Although it is difficult to come up with a brief terminology or a short descriptive phrase, which can fully capture all ranges of transitional justice tenets, employing the term 'transitional justice' is more appropriate as it relatively captures the notion well. For contra, see Ash 1998, pp. 35–40, in which Ash gainsaid and critiqued the three thick capstone volumes of Kritz as 'too narrowly' for framing the title of the volumes as 'Transitional Justice'. He further argued that 'there is no single word for it [dealing with a difficult past] in the English language. German, however, has two long words in regular use: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*. These may be translated as "treating" the past, "working over" the past, "confronting" it, "coping, dealing or coming to terms with" it; even "overcoming" the past. The variety of possible translations indicates the complexity of the matter at hand. Of course, the absence of a word in a language does not necessarily indicate the absence of the thing it describes. Byron remarks somewhere that while the English do not have the word *longueurs* they have the thing in some profusion. But the presence of not just one but two German terms does indicate that this is something of a German specialty.' Be that as it may, seemingly it is polemical as to who is the brain child of the term 'Transitional justice'. Teitel explicitly claimed that she is the one who coined the term 'in 1991 at the time of the Soviet collapse and on the heels of the late 1980s' Latin American transitions to democracy'; see Teitel 2014, p. 3. Werle and Jessberger stated that it was Kritz who used the term first, see Werle and Jessberger 2014, p. 84, footnote 483. However, Teitel contends that other authors had used the terminology before Kritz. Teitel 2009, pp. 329–30.

¹² For a brief discussion on transitional mechanisms and a list of relevant materials on the subject, see Stan and Nedelsky 2013a, pp. 5–111. See generally Roht-Arriaza 2006, pp. 3–13; Hayse 1995; Bassiouni 1999a, b, c, pp. 25–27; Kritz 1995a; Teitel 2000; Hayner 2011, pp. 8–10; Bassiouni 2013, pp. 939 *et seq*; Huntington 1991; O'Donnell et al. 1986.

¹³ This is a way of screening, barring or disqualifying and removal of the former elites, collaborators, agents, secret informers, judges and others who were involved in the perpetration of the violations in one way or another from the positions in the nascent government. Such disqualification or vetting, includes loss of political rights. These mechanisms were widely used in the post-communist Eastern and Central European countries, mostly without accompanying the lustration measure with criminal prosecution. The 'denazification', 'defacisization', and 'destalinization' measures are some of the prototype examples of vetting as one transitional justice mechanism. On lustration, its pros and cons, see Schwartz 1995, pp. 461–483; Stan and Nedelsky 2013a, pp. 46–51; Huyse 1995, p. 337; Bassiouni 1999a, b, c, pp. 24–25; Smith 1995a, pp. 83–90; Smith 1995b, pp. 115–125.

reparation,¹⁴ granting conditional amnesty,¹⁵ to creating traditional dispute settlement mechanisms.¹⁶ It bears mentioning that the universe of transitional justice mechanisms is not limited to the above-listed mechanisms.¹⁷ For the UN, the notion of transitional justice ‘comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve

¹⁴ Reparation includes monetary compensation, restitution, free or subsidized social services, medical treatment, free education, and reduced interest rate loans. It also includes establishment of reminders of the legacy of the past, such as, monuments, museums, and public holidays, which help to keep the repressive past alive in the memory of the collectivity. For more, see Stan and Nedelsky 2013a, pp. 84–88. For collection of essays and case studies on reparation, see De Geiff 2006.

¹⁵ Amnesty is immunity granted to the perpetrators of the human rights. The amnesty can be self-granted amnesty or amnesty given to the members of the predecessor regime by the new government as a tradeoff for peace or for other different reasons. Amnesty can also be blanket or conditional. Blanket amnesty for core crimes is no longer acceptable or it cannot bar prosecution by third states or international courts, or even future prosecution by the same state. Different categories of amnesty were offered to perpetrators in Germany in 1949 and 1954, Argentina in the post-Allende period (1984), South Africa (1995–1996, conditional amnesty), Chile’s Pinochet regime granted so-called unconditional self-amnesty to his officials in 1978, and in Uganda (1986–2000), on the basis of the Amnesty Act of 2000 conditional amnesty was offered. For discussion on amnesty, see generally Mallinder 2008, O’Shea 2002, Ambos 2009, pp. 62 *et seq.*, Stan and Nedelsky 2013c, pp. 10–12, Werle and Jessberger 2014, pp. 88–89, Cassese 2013, pp. 309–312. Although in some transitions (conditional) amnesty is desirable and necessary for the peaceful and expeditious transition from turmoil, ‘it is doubtful that amnesty law may heal open wounds. Particularly when various serious crimes have been committed involving members of ethnic, religious, or political groups, and eventually pitting one group against another, moral and psychological wounds may fester if attempts are made to sweep past horrors the under carpet. Resentment and hate are temporarily suppressed; sooner or later, however, they resurface and spawn even greater violence and crimes.’ See Cassese 2013, pp. 309–310. Hence, states should refrain from obliterating all past offences by way of granting amnesty.

¹⁶ Kritz 1995a, b, c, pp. xxi–xxviii. For the discussion on general notion of Transitional Justice, see Teitel 2014; Werle and Jessberger 2014, pp. 84–90; Roht-Arriaza and Mariezcurrena 2006; Stan and Nedelsky 2013c; Ambos 2009; Elster 2004; Werle 2006; Rwelamira and Werle 1996; Mallinder 2008; Sriram 2004; Verdoolaege 2008; Hayner 1994, pp. 597–655; Hayner 2001; Boraine, Levy, and Scheffer 1995; O’Donnell et al. 1986; Bassiouni 2000; Zalaquett 1992, pp. 1425–1438; Villa-Vicencio and Verwoerd 2000; Tutu 1999; McAdams 2001; Boraine and Levy 1995; Bassiouni 1996, pp. 1–26; Meister 2012. See also Huntington 1991; Kirchheimer 1961; Stan and Nedelsky 2015.

¹⁷ Broadly, transitional justice “involves anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums, and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict.” Roht-Arriaza categorized the transitional justice toolbox into two categories: justice and truth phases. See Roht-Arriaza 2006, p. 2. According to Bassiouni, transitional justice mechanisms or accountability mechanisms fall into three categories: truth, justice and redress. See Bassiouni 2008a, b, p. 20.

reconciliation.’¹⁸ The plausible roadmaps to take to deal with the legacy of past abuses include

both judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹⁹

From this, it is clear that transitional justice encompasses broad categories of measures that help to deal with the evils of the past. Prosecution, truth commissions, lustration (also known as purging, and revamp), conditional amnesty, and reparations are the major and most prominent mechanisms.

Criminal prosecution as a transitional justice mechanism is a way of addressing past crimes by employing the standard criminal law model. In other words, it is a way of investigating and prosecuting or identifying persons responsible for the perpetration of gross human rights violations under the predecessor regime and bringing them to book.²⁰ Criminal sanctions are a form of retributive justice, which focuses predominantly on the perpetrators rather than the victims, and on punishing rather than unravelling the macro-truth. This approach was a dominant mechanism in the post-WWII way of dealing with crimes of the Nazi leaders and others accused of committing atrocious crimes.²¹ Criminal prosecutions were also instituted during the democratization processes in the transitioning Latin American and Eastern European countries in the 1980s and 1990s.²² Criminal accountability as a transitional justice instrument can be achieved before the courts of a state of commission,²³ a third state,²⁴ before international tribunals or internationalized criminal

¹⁸ UN 2004. See also the AU Transitional Justice Policy Frame Work available at <http://www.legal-tools.org/doc/bcdc97/pdf/>. Accessed 20 June 2017.

¹⁹ UN 2004.

²⁰ Werle and Jessberger 2014, pp. 84–85; Cohen 1995, p. 23, Stan and Nedelsky 2013a, pp. 57–58. In addition, for a list of further readings on criminal prosecution as a transitional justice mechanism, see Stan and Nedelsky 2013a, p. 60.

²¹ Tomuschat 2006, pp. 830–844; Overy 2003, pp. 2–29; Taylor 2012; Mettraux 2011, pp. 5–11; Bassiouni 1999a, b, c, pp. 195–201.

²² Kritz 1995b; Stan and Nedelsky 2013b.

²³ This is investigation and prosecution of crimes before the court of the state in which territory the crimes had been committed. The Prosecution of *Derg* officials fall in this category. See infra Sect. 5.2. The prosecution of perpetrators of gross human rights violations in the former GDR after the German Unification is also an instance of prosecution before courts of the state of commission. See Berlin State Court, Judgment of 20 January 1992 (the Trial of Border Guards), Werle 1996, pp. 22–30; Alvarez 2009, pp. 26–27.

²⁴ This is prosecution by a state other than state of commission; the oft-cited example is the Prosecution of Adolf Eichmann for genocide before an Israeli court, and the attempt to bring Augusto Pinochet to book in Spain for the crimes he had committed in Chile during his reign. The prosecutions of the Rwanda genocide perpetrators in several European countries, such as, Germany and France, also fall in this category. See generally Alvarez 2009, p. 27; Jessberger 2009, p. 210; Zalaquett 2002, pp. 48–70; Powerdly 2011, pp. 33–45. For list of different prosecutions, see the chapters in Section II of Bassiouni 1999a, b, c.

courts.²⁵ Prosecution of gross human rights violations can be based on domestic normative frameworks or international criminal law, or a mixture of both.

There are several interconnected rationales underlying the issue of why to prosecute serious human rights violations perpetrated by a predecessor criminal regime. These include: (1) individualizing guilt or culpability. Criminal prosecution helps to repudiate the tenet of collective blame by individualizing the blame and liability for the past abuses to certain individuals; (2) establishing the rule of law. Tyranny begins where the law ends, hence, by using criminal prosecution the newly installed government shall end the deep-seated culture of impunity in order to kick-start the democratization process—criminal prosecutions help to replace impunity with accountability; (3) Deterring future violence and avenging the wrongs done; and (4) complying with the obligation to investigate and prosecute perpetrators of egregious human rights violations.²⁶ This duty emanates from, among other things, treaties,²⁷ and customary international law.²⁸ For instance, as regards core crimes,²⁹ states have a duty to investigate and prosecute perpetrators of these crimes.³⁰ Even the absence of normative legal frameworks theoretically cannot inhibit transitioning states from investigating and prosecuting the alleged core crimes of the predecessor regimes.³¹ The absence of law is a jurisdictional

²⁵ The Nuremberg Trial of the Nazi leaders' best exemplifies this kind of criminal accountability. See Tomuschat 2006, pp. 830–844, Overy 2003, pp. 2–29, Taylor 2012. The classical examples of prosecutions by international courts are those by the ICTR, ICTY, and the ICC. However, some of the investigations and prosecutions by the ICC, strictly speaking might not fulfil the notion of dealing with the past, as there might not be transitions in some situations. Prosecution by internationalized or so called hybrid courts, include the ones by the Special Court for Sierra Leone, the Special Court for Lebanon, the Extraordinary Chamber in Cambodia, and the recently established 'Hissen Habre Court'—the AU's Extraordinary Chambers within the Courts of Senegal. See Donlon 2011, pp. 85–100; Bassiouni 2013, pp. 727–768; Cassese 2013, pp. 263–66; Fall 2014. For a wide array of essays on hybrid courts, see Romano, Nolikaemper and Kleffner 2004.

²⁶ For arguments in favor of prosecution, see Stan and Nedelsky 2013a, pp. 57–58; Hayse 1995, pp. 339 *et seq*; Cohen 1995, pp. 7–50; Kritz 2002, pp. 25–26; Olsen et al. 2010; Sikkink 2011; Teitel 1995, pp. 146–147.

²⁷ Articles I and VI Genocide Convention; Article 49(2) of Geneva Convention I, Article 50 (2) Geneva Convention II, Article 29(2) of Geneva Convention III; Article 146(2) of Geneva Convention IV, Article 85 of Addition Protocol I to the Geneva Conventions; and Article 7 of Convention against Torture require contracting parties to prosecute or extradite perpetrators of genocide, war crimes that amount to grave breaches and torture. See Tomuschat 2002, pp. 315–349; Orentlicher 1991, pp. 2537–2615; Roht-Arriaza 1995b, pp. 24–38; Werle and Jessberger 2014, pp. 79–80; Schabas 2000, pp. 355–360.

²⁸ See generally Tomuschat 2002, pp. 315–349; Cassese 2013, pp. 19–21; Bassiouni and Wise 1999, pp. 76 *et seq*; Bassiouni 2013, pp. 143–204; Cassese 2009, pp. 305–306; Roht-Arriaza 1995a, b, pp. 39–55; Goodwin-Gill 1999, pp. 200–224; ICRC 2005.

²⁹ On core crimes, see *supra* Sect. 3.3.

³⁰ Cassese 2009, pp. 305–306; Bassiouni and Wise 1995; Werle and Jessberger 2014, pp. 45–49.

³¹ After crimes have risen or elevated to the level of *jus cogens* or core crimes there are certain non-derogable obligations—*erga omnes*—that consequently follow. These include, obligation to prosecute (this means submit the matter to investigation) or extradite (to cooperate with or provide necessary assistance to other states)—‘*Aut Dedere Aut Judicare*’; non-applicability of statute of

limitation, which can be rectified by enacting a law that confers jurisdiction on the court without violating the notion of *nullum crimen sine lege*.³² In other words, by way of direct application of customary international law before the domestic courts, the legal vacuum in relation to the core crimes can technically be dealt with—as core crimes are recognized as non-derogable peremptory norms. However, this idea of direct enforcement of customary international law by domestic courts has not been widely supported by state practices; rather, it is more inchoate than pragmatic and well-established. Legal deficiency on core crime can be best defied or obviated by codification or implementation of the core crimes under national criminal law. In the absence of core crimes in national laws, a transitioning state can also resort to the ordinary crimes approach to prosecute officials of the ousted regime, although the ordinary crimes approach is often criticized for lacking the emblematic moral condemnation that the core crimes carry.³³

Be that as it may, although criminal prosecution constitutes one prominent transitional justice mechanism, in some cases investigating and prosecuting perpetrators of core crimes might not be possible, as doing so might destabilize the fragile peace or cause social divisiveness. The outgoing government might still have a *de facto* power base, in which case prosecuting the officials might affect the fragile peace. This unpredictability could compel the nascent democracy to limit the judicial accountability or opt for non-prosecution altogether. As aptly described by Werle and Jessberger, ‘the waiver of punishment may be essential in certain situations to restore peace and facilitate national reconciliation.’³⁴

Transitional justice is not circumscribed to criminal justice. The latter is but part of an array of mechanisms that could be brought to bear in dealing with past injustices. The transitional government can have recourse to non-judicial transitional justice mechanisms listed above, such as truth commissions, which are adjuncts to the judicial mechanism. Truth commissions are official fact finding bodies, which serve to uncover past injustices perpetrated under a dictatorship or during a civil war. They are defined as ‘official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law

limitations or prescription; no recognition of blanket amnesty for core crimes; and arguably duty to eliminate immunity for such crimes. See Bassiouni 1999a, b, c, p. 11; Bassiouni 2011, p. 87; Bassiouni and Wise 1995; Werle and Jessberger 2014, pp. 45–49. Article 28 of the Federal Democratic Republic of Ethiopia Constitution also reflects such notions as it declares lucidly that the statute of limitations and amnesty do not apply for core crimes.

³² Bassiouni 1999a, b, c, p. 301; Meron 2005, pp. 817–834. Contra, see Fletcher and Ohlin 2005, pp. 539–561.

³³ Bassiouni 1999a, b, c, p. 302; Heller 2012, pp. 202–248.

³⁴ Werle and Jessberger 2014, p. 89.

committed over a number of years.³⁵ Such bodies are temporal victim centred commissions; and their subject matter mandate does not include prosecution and punishment. They are not courts of law but serve more as arenas in which the victims of abuse can recount how they were abused. Truth commissions can be national truth commissions,³⁶ mixed³⁷ or international.³⁸ Just as the names of truth commissions that have been established thus far vary, so do their mandates,³⁹ duration, the time period that they cover, and composition. To distinguish truth commission from a court, administrative tribunal, human rights commission and other bodies with adjudicatory power, Hayner identified four defining characteristics or attributes of truth commissions, namely: (1) they focus on past events; (2) they consider conflict in general terms as opposed to specific or particular

³⁵ UN 2004. A leading scholar in the area defined truth commissions as ‘bodies set up to investigate a past history of violations of human rights in a particular country—which can include violations by the military or other government forces or by armed opposition forces.’ Hayner 1994, p. 600, Hayner 2001, p. 14. Freeman, by criticizing the definition of truth commissions advanced by Hayner, defined a truth commission as ‘an ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention’ see Freeman 2006, p. 18. On the features put forward by Freeman, Hayner stated that ‘while most of these elements are accurate most of the time, these may be descriptive rather than definitional points, and in some cases would exclude commissions unnecessarily; further, the length and complexity of such a definition makes it unwieldy for common usage.’ See Hayner 2011, p. 11. Hayner in her second edition of ‘Unspeakable Truth’ admitted that the definition of truth commission advanced in her earlier works had some blind spots or limitations. She put forward four features of a truth commission: (1) focuses on the past; (2) set up to investigate a pattern of abuses over a period of time, rather than a specific event; (3) a temporary body, with the intention to conclude with a public report; and (4) officially authorized or empowered by the state, Hayner 2011, p. 11.

³⁶ There are several national truth commissions which have been established since the first Truth Commission of Idi Amin of Uganda in 1974. Since then, over 40 truth commissions with different names, mandates, years of coverage, and nature have been established, Freeman 2006, p. 317; the United States Institute of Peace digital collection of truth commissions available at <http://www.usip.org/publications/truth-commission-digital-collection>. Accessed 16 June 2016; and Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at <http://www.ijr.org.za/trc-database-themes.php>. Accessed on 16 June 2014. The most prominent prototypes of national truth commissions are the Truth and Reconciliation Commission of South Africa; the National Commission on the Disappeared of Argentina, and the National Commission for Truth and Reconciliation, see Hayner 2011, pp. 28 *et seq.*

³⁷ Guatemalan Historical Clarification Commission is the archetype of mixed truth commission, see Tomuschat 2001, pp. 233–258; Hayner 2002, pp. 45–49

³⁸ For example Commission on the Truth for El Salvador, see Buergerthal 1994, p. 497.

³⁹ Some truth commissions have the mandate to grant amnesty, to list names of perpetrators or name names, power to order search and seizure, and/or to subpoena. See the detailed table of the mandates and other features of diverse truth commissions in Freeman 2006, p. 317. See also the United States Institute of Peace digital collection of truth commissions available at <http://www.usip.org/publications/truth-commission-digital-collection>. Accessed 16 June 2016; and the Institute for Justice and Reconciliation, Truth Commissions: Comparative study available at <http://www.ijr.org.za/trc-database-themes.php>. Accessed 16 June 2016.

events; (3) they are ad hoc in nature and conclude with general findings; and (4) they operate under authority be it national or international auspices.⁴⁰

Although the reasons for the establishment of a truth commission depend on several factors, the setting up of truth commissions is crucial.⁴¹ This is so because they clarify the contested history and unearth the truth. In cases where gross human rights violations were committed by the ousted dictatorial regime or during the conflict in a less overt way, establishing a truth commission helps to bring full disclosure and establish knowledge. Even in cases where violations were committed openly, it is still necessary for the transitional government to establish a truth commission for the purpose of official acknowledgement and to break the cycle of denial. In the words of Neier, 'acknowledgement implies that the state has admitted its misdeeds and recognized that it was wrong'.⁴² Breaking the cycle of denial by way of official acknowledgement has pivotal importance for starting the process of healing the physical and psychological wounds inflicted on the victims. Moreover, truth commissions help to promote reconciliation. In addition, truth commissions play a significant role in recommending steps that transitioning states could take in promoting the rule of law and preventing future abuses.⁴³

Given the diverse ranges of transitional justice mechanisms at the disposal of transitioning states, it bears noting that there is no one-single-fits-all mechanism. In addition, one mechanism is neither a substitute for the other nor sufficient by itself to address past wrongs.

During the early years of the modern transitional justice era, meaning the late 1980s and for much of the 1990s, there was a peace versus justice debate that accompanied transitional justice processes. Transitional justice mechanisms were considered dichotomous. Many argued that one cannot 'cut the cake both ways,' by which was meant 'peace' and 'justice' were mutually exclusive. The gist of the debate was that to choose between criminal prosecution, which represented justice, and other non-judicial mechanisms, representing peace.⁴⁴ This dichotomous approach, however, started fading, giving way to the current, predominant view, according to which peace and justice are considered as complementary rather than contradictory.⁴⁵ The two concepts not only go hand in hand, but also, more often than not, are considered mutually reinforcing and dependent on each other. As pointed out above, what is undeniable is that in some transitions there might be a need for a careful timing and sequencing of the measures, depending on the

⁴⁰ Hayner 2001, p. 14. Freeman pointed out some more defining attributes of truth commissions that he thinks Hayner omitted, see Freeman 2006, pp. 14–17.

⁴¹ Hayner 2001, pp. 24–30.

⁴² Neier 1992 as cited in Hayner 2001, p. 26.

⁴³ Hayner 2001, pp. 72–80.

⁴⁴ Stan and Nedelsky 2013a, pp. 58–59; Sriram and Pillay 2009; Clark 2011, p. 539.

⁴⁵ Clark 2011, p. 540; Sriram and Pillay 2009; Ramji-Nogales 2010, pp. 1–71; Keller 2008, pp. 209–278; Fletcher, Weinstein and Rowen 2009, pp. 163–220; Minow 1998; Rotberg 2000, pp. 3–20; Cassese 1998, pp. 1–10; Kerr and Mobekk 2007; Clark 2009, pp. 463–487; Fletcher and Weinstein 2002, pp. 573–639.

practical context of the transition. Other than that, considering the two as opposing notions is unconvincing.⁴⁶ Admittedly, the peace-justice debate has not thoroughly withered away and been replaced by a truth and justice approach. No matter how unpersuasive the peace or justice approach is, a transitioning state may still be confronted with the reality of having to make hard choices between the options.

To sum up, transition after mass atrocities is a complex, if not daunting, task given the difficulties of having to select which transitional justice mechanism or which combination of mechanisms should be brought to bear in dealing with past state criminality. Transitional justice requires a cautious balancing of local peculiarities and the demand for justice. When a transitional government chooses transitional justice mechanisms, it should opt for those that fit its context and actual situation. Accountability mechanisms adopted in transitioning Latin American countries do not necessarily hold good for transitions elsewhere, for example, in Ethiopia.

Every country has a unique culture and social factors that led to the conflict; hence, it is necessary to tailor the transitional justice mechanisms to prevailing realities. However, a nation does not have to ‘invent’ a new approach from nothing,⁴⁷ for it can draw on the experiences of several predecessor models applied elsewhere.⁴⁸ Also, the kinds of accountability mechanisms employed by the transitional governments depend on multilayer, and multitude of, factors, such as, the nature of transition, the scale and intensity of the preceding conflict, the extent of the gross human rights violations, the existence of a legal framework within which accountability mechanisms operate, and a host of other factors.⁴⁹ The use of a combination of transitional justice mechanisms is desirable where broader outcomes are desired.

The section below deals with the circumstances during the transition from the *Derg* past to the Ethiopian People Revolutionary Democratic Front (EPRDF). This will be followed by a discussion of the approach adopted by the Transitional Government of Ethiopia to confront the *Derg* past.

4.2 Promulgation of the Interim Charter and the Establishment of the Transitional Government

By using the Red Terror, the Mengistu regime succeeded in part to decimate urban civilian opposition groups. However, it failed to deal with the insurgents in the same way. In other words, even though the *Derg*’s reign of terror helped it to

⁴⁶ Stan and Nedelsky 2013a, pp. 58–59.

⁴⁷ Kritz 2002, p. 23.

⁴⁸ The Argentinian model influenced the Chilean. The South African approach took a lesson from the Chilean. The Guatemalan was informed by the El Salvador experiences. See Kritz 2002, p. 23.

⁴⁹ Bassiouni 2000, p. 40; Stan and Nedelsky 2013a, p. 7.

prolong its grip on power, it failed to achieve the desired goal in the fight against insurgents. After a lengthy battle with the ethnic-based rebels, like the Tigray People Liberation Front (TPLF), the Eritrean People Liberation Front, and the Oromo Liberation Front, the *Derg* was finally toppled militarily on 8 May 1991. Ethiopia's transition from the totalitarian Mengistu regime to the current ruling EPRDF was not a result of a negotiated settlement or a consequence of external intervention. Rather, guerilla fighters brought down the *Derg* regime after 17 years' rule. Thus, the 1991 transition resulted from a complete military defeat.

Leaving most of his henchmen in Ethiopia, Mengistu fled to Zimbabwe where he still enjoys asylum. When the rebels took control of Addis Abeba, the EPRDF soldiers apprehended approximately 2,000 senior *Derg* military officials and their civilian personnel. Thereafter, with the aid of ordinary civilians, the EPRDF security forces continued to apprehend suspected *Derg* officials.

Soon after the *Derg* was ousted, a five-day-long conference, called the 'Peaceful and Democratic Transitional Conference of Ethiopia,' was convened by the EPRDF to discuss the establishment of a transitional government. Several ethnic-based fronts and movements, like the Oromo Liberation Front, participated in the Conference. On the last day of the conference, which was on 5 July 1991, the Transitional Charter or the Interim Constitution established the Transitional Government consisting of the Council of Representatives and the Council of Ministers. The Council of Representatives, a body with a legislative function, was composed of representatives of different ethnic-based liberation movements, political organizations, and prominent individuals. Pursuant to the Charter, the Council of Representatives was charged with the function of formulating the rules of procedure, forming an Executive Committee, adopting a national budget, administering justice, establishing the Constitutional Commission, ratifying international agreements, devising defense and security policy, enacting laws regulating the press, and governing labor.

The Transitional Charter (Interim Constitution) served as the fountainhead of the law during the transitional period from 1991 to 1995. As enunciated in the Preamble, the Transitional Charter banned and dismantled the Workers Party of Ethiopia, the *Derg* security structure, and all other instruments of repression installed by the *Derg* regime. The Interim Constitution set out the transitional program. In addition, the Charter declared that the demise of the Mengistu regime 'marks the end of an era of subjugation and suppression thus starting a new chapter in Ethiopian history in which freedom, equal rights and self-determination of all peoples shall be the governing principle of political, economic and social life.' The Charter further stated unambiguously that the 'proclamation of a democratic order [was] a categorical imperative' for a democratic transition in order to realize the aspirations of the peoples of Ethiopia.

In its Part Two, the Charter recognized several basic rights and freedoms by way of incorporating the Universal Declaration of Human Rights. Furthermore, the Transitional Government ratified numerous international and regional human rights treaties, such as, the International Covenant on Civil and Political Rights; the International Covenant on Socio-Economic and Cultural Rights, the UN Torture

Convention; the Convention on the Rights of the Child; and the African Charter on Human and People's Rights. Such actions constituted indisputably some of the decisive steps on the road to a democratic dispensation. They are of supreme importance, especially in a country like Ethiopia, which did not have a democratic heritage, but a deep-seated culture of violent change of regime and an antipathy for respect of basic human rights, with the latter having been regarded as a privilege bestowed by erstwhile Ethiopian emperors on those they regarded as their subjects.

However, the recognition of rights under the Charter and the domesticated human rights treaties, did not suffice to make Ethiopia rise like a phoenix from the ashes, and set in motion the process of healing and reconciliation after the damage done by Mengistu and other antecedent regimes.

As outlined in Chap. 2 of this book, the Mengistu regime had perpetrated gross human rights violations on a sweeping scale with absolute impunity during the 17 years of its tenure. The atrocious crimes perpetrated against Ethiopians by the Mengistu regime ranged from unlawful detentions, summary executions, torture, arbitrary arrests, enforced disappearances, unlawful disposessions of property, misuse of donor aid and forced resettlements. The atrocities resulted in the death of tens of thousands of individuals. In short, the country was scourged by the lawlessness of the *Unrechtsstaat*.

What the Transitional Government inherited from the *Derg* was a country bereft of public funds, not to mention shattered public institutions and the dysfunctional state machinery that the despot left behind. The survivors, families of the victims, and Ethiopians in general, were in quest of the whereabouts of the disappeared members of their families, demanding that those responsible be held accountable. The new Transitional Government found itself on the horns of a dilemma, for, in addition to recognizing the basic rights of the citizenry, how was it to respond, with limited resources at its disposal, to the egregious human rights violations of the predecessor authoritarian regime. What was the appropriate course to chart for Ethiopia's transition from the virulent dictatorial regime of Mengistu to the dawning of a genuinely democratic system?

The Transitional Government of Ethiopia was faced, among other things, with the herculean task of how to confront the state sponsored gross human rights violations, and what to do to the huge number of detained *Derg* officials. This was an immensely perplexing challenge, yet one to face in order to address and redress the social discontent and to set the democratization process on its path. In other words, confronting the *Derg*'s repressive past was an arduous yet necessary task.

The large number of perpetrators and the staggering scale of the crimes committed by the *Derg* regime made confrontation of the *Derg* past a herculean task for the Transitional Government. Even for a state with well-established institutions, let alone for a poor transitioning state like Ethiopia with no functioning justice machinery, this would have been a herculean task to overcome.

In some transitions, the successor regime's attempts to hold officials of the repressive predecessor regime criminally accountable, have upset the fledgeling democracy as the old regime still enjoyed *de facto* authority. For instance, in Chile, El Salvador, Argentina, and Haiti, the ousted repressive military governments

threatened and blocked the successor governments' attempt to confront gross human rights violations. In such cases, there is a need to postpone the transitional justice measures, especially prosecution, for some time so as not to foment the next round of violence. However, Ethiopia's transition differed from the transitions in the above-mentioned countries in that the predecessor regime that was responsible for the abuses did not have the power to threaten state security.

To avoid grappling with the challenges of dealing with the past, could the Transitional Government have legally opted to close the chapter on the *Derg*'s past, by choosing to forget what happened in the past? Even if dealing with the past, in general and the *Derg* past, in particular, were a complex and difficult task, turning a blind eye to the repressive past was not a viable option. This is so because such an approach could not lead to the much needed 'healing of wounds' and democratization process—as an unaddressed and unprocessed past would haunt the nation sooner or later.

Over the last few years, it has become increasingly clearer that closing the chapter on past gross human rights violations, and saying let's 'forget and forgive' each other without digging into the past does not help a nation torn apart by terror and wars to move forward to a democratic future. It is true that there are many factors that need to be considered in deciding to confront the past eventually, but an attempt to move forward without reckoning with the past is hardly possible. The popular approach following the demise of a repressive regime or the end of a horrific civil war is to confront the repressive past by using appropriate transitional justice mechanisms.

From the full ranges of transitional justice mechanisms, the Transitional Government of Ethiopia chose criminal accountability to confront the criminal past of the *Derg*.

4.3 Criminal Accountability as a Means to Confront *Derg* Crimes: The Establishment of the Special Public Prosecutors Office

The Transitional Government of Ethiopia, from the range of transitional justice mechanisms at its disposal, opted for criminal accountability to reckon with the tyrannical past. Restitution of unlawfully confiscated properties and lustration ('*de-dergification*')⁵⁰ took place, but only minimally. Other transitional justice mechanisms, such as, reparations or compensation, were not brought into play at all.

⁵⁰ The Transitional Charter dismantled the repressive institutions that were established by the *Derg*. As a result, the military, judiciary, and most state apparatuses were dismantled. Subsequently, laws enacted by the Transitional Government and also the current administration banned *Derg* officials from assuming office and in some cases from exercising their political rights. Transitional Period Charter 1991, Preamble para 5. See also Proclamation 8 of 1998; Proclamation

Several reasons account for why the Transitional Government of Ethiopia opted for extensive prosecutions of *Derg* officials. Stan and Nedlesky commented that the insurgents who ousted the Mengistu regime had made up their mind as to which approach they would adopt before establishing the government.⁵¹ The deceased Melese Zenawi, who was the President during the transition and who later served as Prime Minister until his death in 2012, stated that they opted for criminal accountability for the sake of ending impunity and restoring justice.⁵² According to him, amnesty, rightly so, was not considered as an option because it would not help to break with the *Derg* past.

However, the main factor that seems to have influenced the Transitional Government's choice of criminal accountability as the main means to confront the *Derg* crimes was the nature of Ethiopia's transition. The transition in Ethiopia was not a result of negotiated settlement, as was the case for example in El Salvador and South Africa, nor was it a result of gradual democratization, as in Argentina and Uruguay. The Ethiopian transition was a result of a complete military defeat of the dictatorial Mengistu regime by the insurgents. The *Derg* officials could therefore not threaten mayhem, as they were wholly bereft of power. Apart from this, they were completely discredited by ordinary Ethiopians who had suffered numerous atrocities at the hands of *Derg* officials, and who were demanding criminal accountability. Opting for rigorous prosecution thus was not a Hobson's choice for the Transitional Government, nor posed any challenge to the fledgeling peace. Put differently, Ethiopia's mode of transition from the totalitarian regime of Mengistu to the EPRDF explains why the Transitional Government opted for criminal accountability.⁵³ There was also no legal impediment to instituting criminal prosecutions, neither was there a partial, conditional or blanket amnesty that could block or challenge criminal accountability. The *Derg*, unlike some of the erstwhile dictatorships in South America that passed laws to amnestied the acts of their officials, did not even have the time to promulgate amnesty decrees before it was overthrown. To be sure, even had the toppled Mengistu regime passed an amnesty law, it would not have prevented the Transitional Government from prosecuting *Derg* officials. The reason lies in the fact that amnesty, particularly blanket amnesty, for

23 of 1992; Proclamation 7 of 1992; Proclamation 64 of 1993 as amended by Proclamation 96 of 1994; Proclamation 27 of 1996; Proclamation 40 of 1993. See also *infra* Sect. 6.1.6.

⁵¹ Stan and Nedelsky 2013b, p. 169.

⁵² Stan and Nedelsky 2013b, p. 169.

⁵³ Stan and Nedelsky state that 'the chances of prosecutions are slim if the new power-holders either are part of or have close ties to the regime responsible for the abuses. The classic example is Chile after its transition to Democratic rule in 1990, where its former dictator Augusto Pinochet remained Head of the Armed Forces and in addition enjoyed immunity as Senator-for-Life.' Stan and Nedelsky 2013a, p. 57. In the Ethiopia's transition, the former officials did not have any authority, nor link with their ousters. Hence, this obstacle was not present.

serious human rights violations is intolerable and cannot bar prosecution.⁵⁴ The absence of an amnesty law could also be another reason that triggered the new regime's decision to use prosecutions as the main means of confronting *Derg* crimes. Moreover, according to Kidane, the international pressure that was brought to bear on the Transitional Government was one of the factors that led to the prosecution of *Derg* officials.⁵⁵ Basically, it is submitted the interaction of these factors propelled the Transitional Government to opt for criminal accountability as the main mechanism of dealing with *Derg* crimes.

However, there were other challenges that the Ethiopian government faced when opting for extensive criminal prosecution, namely, a poor infrastructure, including a lack of resources, both of personnel and institutions.⁵⁶ The *Derg* regime had brought all institutions under its control and had employed them as instruments of repression. The fact of the matter is that the Transitional Government inherited dysfunctional state infrastructure. Regardless of these and other obstacles, the Ethiopian government decided to bring Mengistu and his henchmen to book by using the Ethiopian courts, without introducing international elements. Hence, the first thing that the Ethiopian government had to do after opting for criminal accountability was to re-establish and restructure the judiciary and the prosecution service.

4.3.1 Creation of the Special Public Prosecutor's Office and Establishment of a New Court System

The Transitional Government dismantled the institutions set up by the *Mengistu* regime, including the judicial system and prosecutorial authorities.⁵⁷ Moreover, the former police forces were prohibited from operating, and carrying out all police functions. In the early transitional years, EPRDF soldiers carried out police function, including arresting suspected *Derg* officials, until such time that Peace and

⁵⁴ Inter-American Court of Human Rights, *Barrios Altos v Peru*, Judgment on Merits (2001), §§ 41–44. The United Nations Secretary General in its disclaimer to the agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stated that 'the United Nations interprets that the amnesty and pardon in Article 9 of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian laws.' UNSC Resolution 1270. See also Cassese 2013, pp. 310–12. The FDRE Constitution reinforces same idea. The relevant provision reads as follows: 'Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.' Article 28(1) of the FDRE Constitution.

⁵⁵ Kidane 2002, p. 668.

⁵⁶ Haile 2000.

⁵⁷ The Transitional Period Charter of 1991.

Stability Committees had been established. When the EPRDF seized power, its soldiers arrested 2,000 *Derg* officials suspected of having committed human rights violations, and kept them in custody until late 1994, waiting to be charged or released. This was because there was no existent judicial and prosecutorial service. It was only in 1992 that the Transitional Government started putting in place the necessary infrastructure to commence with investigations of the detained suspects.

The Transitional Government of Ethiopia established the Special Public Prosecutor's Office (SPP) on 8 August 1992,⁵⁸ not by a presidential decree; instead, by a law of the Council of Representatives, the law-making organ during the transitional period.⁵⁹

4.3.1.1 Mandate

The SPP was entrusted with an ambitious twofold mandate.⁶⁰ These were: the power to investigate and prosecute *Derg* crimes, and to establish a historical record of the gross human rights violations.

Investigating and Prosecuting *Derg* Crimes

The first, and perhaps the most important, mandate of the SPP was to investigate and prosecute *Derg* crimes.⁶¹ The provision that outlined the SPP's powers read as follows:

The office shall, in accordance with the law, have the power to investigate and institute proceedings in respect of any individual having committed or responsible for the commission by abusing his position in the party, the government or mass organization under the *Derg*-WPE regime.⁶²

The Office was given the power to investigate and prosecute alleged offences committed by the *Derg* officials, and these included senior *Derg* officials, members of the security and armed forces, and representatives of urban dwellers' associations

⁵⁸ Proclamation 22 of 1992.

⁵⁹ On the basis of Article (9) (d) of the Transitional Charter, the Council established the SPP two weeks after it was formed. As Howland stated, the SPP was not a creation of a presidential decree. See Howland 2000, p. 2.

⁶⁰ The Report by the SPP bluntly stated the ambitious nature of the mandates entrusted to the Office. It aptly observed that [t]he mandate is broad and ambitious. ... The ambitious nature of the decision has both risks and benefits. It is easier to say one is going to do something, than to do something novel and precedent setting well. The mandate has created expectations in the international human rights community, the donor community, and in the Ethiopian community.' The SPP Report 1994, p. 1.

⁶¹ Article 6 of the SPP Proclamation.

⁶² Article 6 of the SPP Proclamation.

and peasant associations.⁶³ The categories of accused targeted for investigation and prosecution by the SPP were bluntly delineated by the law.

From the above, it is clear that the SPP's mandate to investigate and prosecute was confined to *Derg* officials. In other words, the SPP was not given the mandate to investigate and institute proceedings against individuals who were not in the *Derg* system. Instead, its mandate was limited to those who were in the *Derg* regime including the committees, the *kebeles*, and other squads that made up the *Derg*'s panoply of repressive instruments, or those who were associated with the *Derg* administration. The SPP had no personal jurisdiction over members of the opposition to the *Derg*.⁶⁴ Thus possible crimes that were committed by the civilian leftists and the insurgents were precluded from the SPP mandate. Crimes allegedly committed by the victorious insurgents and civilian oppositions fell beyond the realm of the SPP mandate.

As discussed in Chap. 2 of this book,⁶⁵ it is clear that the civilian opponents to the *Derg* had also committed crimes, regardless of their degree of heinousness. It is unclear why the SPP's mandate was confined to *Derg* crimes. There is no denying the fact that the crimes committed by the *Derg* officials were incomparably worse than those committed by the opposition movements in terms of both the scale and gravity. But to have limited the SPP to dealing only with crimes committed by *Derg* officials was undoubtedly inappropriate. Such one-sided narrow mandate undermined the SPP's credibility and legitimacy from the very outset, as the process was made to look like a victor's vendetta. What bears noting here is that the exclusion of the crimes committed by the opposition groups, that is, the civilian opposition during the so-called White Terror and the insurgents during the civil war, from the SPP's mandate, does not on its own make the whole exercise by the SPP a futile exercise. To authorize the SPP to investigate and prosecute *Derg* crimes primarily was an appropriate and desirable policy decision. Nonetheless, to make the whole process more appropriate and complete the Transitional Government should have broadened the ambit of the SPP's mandate to include the (serious) crimes committed during the *Derg* regime, irrespective of the quarter from which they originated. There is no compellingly convincing logic that explains the exclusion of the alleged crimes committed by the opposition movements.

Although the law was very specific about the category of the suspects to be investigated by the SPP, it did not clearly specify the kind of crimes for which they should be investigated.⁶⁶ The law stated that the SPP had the mandate to investigate *Derg* officials for the 'offences' they had committed.⁶⁷ From the generic term 'offences' it is clear that the SPP's mandate was not confined only to serious crimes

⁶³ Article 6 and Preamble para 4 of the SPP Proclamation.

⁶⁴ Its power was delimited to conduct investigations and institute proceedings against those it suspects of committing crimes and/or abusing their positions of authority in the former regime.

⁶⁵ Supra Sects. 2.3 and 2.4.

⁶⁶ See Article 6 of the SPP Proclamation.

⁶⁷ Preamble and Article 6 of the SPP Proclamation.

committed by the *Derg*—all alleged *Derg* crimes, both serious and petty offences, were included within the SPP's mandate.⁶⁸ Thus, the argument that the alleged crimes perpetrated by the opposition factions, including members of the Transitional Government, were excluded from the SPP mandate because they are of lesser gravity is not convincing. Even if it were only the serious *Derg* crimes which were to be investigated and prosecuted by the SPP, excluding the crimes committed by the *Derg*'s opponents because they were of a 'less serious nature,' is putting the cart before the horse. In the absence of an independent fact-finding or investigatory body, the Transitional Government could not legitimately make a determination upfront about the seriousness or otherwise of the alleged crimes committed by the opposition groups. Therefore, it would have been appropriate to empower the SPP to investigate all serious crimes committed during the Mengistu reign, regardless of who the perpetrator was. It is not the SPP that carries the blame for the partisan investigations and prosecutions, but the Transitional Government, the empowering authority.

Even though the crimes committed by the opposition groups were outside the mandate of the SPP, the ordinary or regular prosecutors had the power to investigate and prosecute such crimes. The SPP had primacy over regular prosecutors only in respect of investigating and prosecuting *Derg* crimes. Where cases against *Derg* officials had been instituted by regular prosecutors before the coming into force of the SPP, the latter was empowered to have them transferred to it.⁶⁹ Equally, if in the course of its investigation, the SPP found that the crimes fell outside its mandate, it had to transfer those cases to the regular prosecutors.⁷⁰

The SPP could delegate its authority to the regular prosecutors to investigate less serious crimes or crimes not punishable with rigorous imprisonment that were allegedly committed by the *Derg* officials.⁷¹ For all crimes, including the crimes allegedly committed by the opposition that were not within the purview of the SPP mandate, the regular prosecutors could, and were obligated, to investigate and prosecute. To the best of this author's knowledge, no crimes allegedly committed by the opposition were ever (investigated and) prosecuted, neither did the SPP

⁶⁸ This can be inferred from the cumulative reading of Article 6s and 10 of the SPP Proclamation.

⁶⁹ Article 11(2) of the SPP Proclamation. In this regard, the SPP's power was similar to the primacy jurisdiction of the UN *ad hoc* courts.

⁷⁰ Article 9 of the SPP Proclamation.

⁷¹ Article 10 of the Transitional Period Charter of Ethiopia. The fact that Ethiopia chose to embark on rigorous criminal prosecutions is indicated under this provision. The prosecutions were not limited to the most responsible persons; instead, the law empowered the SPP to investigate all individuals who perpetrated most serious crimes, as well as less serious ones. As will be shown in the next chapters, these resulted in protracted proceedings. To avoid the delay, the SPP could have delegated the power to investigate and prosecute less serious crimes to the regular prosecutors. But again it can be argued to the contrary, that the less serious crimes did not take much of the SPP's energy and time. True, the less serious crimes were the easy ones to handle compared to the sophisticated core crimes; however, delegating the power to the regular prosecutors could have helped the SPP from embarking on the daunting task of going after every small cog in the large machine.

delegate to the regular prosecutors the power and duty to investigate and prosecute *Derg* crimes.⁷² Members of opposition groups who were responsible for the commission of crimes against their own party members, *Derg* officials, and other individuals, remain at large or unaccounted for.⁷³

Establishing Historical Record of the Violations

The second mandate of the SPP was to establish the truth and keep a historical record for posterity. This truth-finding function of the SPP was not stated in the above-mentioned Article that specifically delineated the other power of the Office.⁷⁴ Instead, it was outlined in the Preamble of the Proclamation, which read as follows:

It is in the interest of just historical obligation to record for posterity the brutal offences, the embezzlement of property perpetrated against the people of Ethiopia and to educate the people and make them aware of these offences in order to prevent the recurrence of such a system of government.⁷⁵

Based on the wording of the above-quoted text, the truth-finding and documenting role is taken as another mandate of the SPP. The Office confirmed in its report that it had the mandate ‘to establish for public knowledge and for posterity a [*sic*] historical record of the abuses of the *Mengistu* regime.’⁷⁶ With this as its second mandate, a transitional justice scholar, Hayner, categorized the SPP as a truth commission.⁷⁷ In the opinion of the author, the SPP was in fact not a truth commission. This is so because from the spirit of the Proclamation that established the Office, the truth-finding and documenting functions were not the priority or main mandates of the SPP; rather, they seemed corollary to the first mandate. The SPP’s prime duty and priority were to prosecute *Derg* Officials, and that is what it has done.

The SPP was entrusted with the tasks of not only investigating and prosecuting crimes committed by *Derg* officials but also a corollary duty to document the violations. This idea of expecting a prosecutorial organ to establish and record the truth about serious human rights violations that had happened during the 17 years of the *Derg* reign was problematic and burdensome. Prosecutorial organs, by their very nature, concentrate mainly on gathering evidence to substantiate in court the

⁷² See *infra* Sect. 6.1.

⁷³ For the alleged crimes committed by the oppositions, see *supra* Sects. 2.3 and 2.4.

⁷⁴ Article 6 of the SPP Proclamation.

⁷⁵ The SPP Proclamation, Preamble, para 5.

⁷⁶ The SPP Report 1994, p. 1. In addition, the Chief Prosecutor in his statement to United Nation Commission on Human Rights blatantly stated that: ‘The Office of the Special Prosecutor has been mandated to create a historical record of the abuses of the *Mengistu* regime and to bring those criminally responsible for human rights violations and/or corruption to justice.’ Special Prosecutor Office of the Transitional Government of Ethiopia (1994) Statement to UN Commission on Human Rights E/CN.4/1994/103 3 February 1994, p. 5.

⁷⁷ Hayner 1994, pp. 634–35.

validity of the charges brought against the accused. In other words, it is not the duty of prosecutorial organs or courts to establish the root causes of conflicts, and the whole truth in respect of serious human rights violations. It is undeniable that the prosecution, by way of securing a conviction or otherwise establishes a kind of judicial truth about the serious violations. Nevertheless, prosecutorial organs alone cannot establish the comprehensive truth about events pertaining to human rights violations.⁷⁸ The SPP was not prepared and organized in a way that could help it to establish the comprehensive truth and record the serious violations. The Office staff were not as diversified and as specialized so as to accomplish the recording function; instead, most of the personnel were prosecutors. As the name itself indicated, the Office was prepared only to investigate and prosecute, and not to record the gross violations. Ideally, it would have been better had the Transitional Government established a separate truth finding and recording organ linked to the SPP. In that case, the organ would have been properly equipped, both in terms of its composition and structure, to record the human rights violations committed during, and even before, the *Derg* regime assumed power. In addition, such an arrangement would have made the task of the SPP much lighter.

In sum, the SPP's primary mandate was to investigate and prosecute *Derg* officials. The documentation of the violations was a corollary duty. Put differently, the SPP had no primary obligation to establishing the truth, or of documenting the violations. In other words, the SPP was not primarily geared towards establishing the macro-truth. The result was that the notion of unravelling the truth and recording the gross violations perpetrated during the Mengistu reign fell by the wayside.

4.3.1.2 Years of Coverage, Organization, and Duration of the Special Public Prosecutor's Office

The SPP's mandate to investigate and prosecute *Derg* crimes covers the whole span of the *Derg* reign. It was entrusted with a daunting task of prosecuting crimes perpetrated by the *Derg* officials for 17 years, being the period from 1974 to 1991. The law that established the SPP did not clearly specify the duration of the SPP's operation. It stated merely that the 'term of the Office shall terminate upon accomplishments of the task.'⁷⁹ It would have been better had the law specifically required the SPP to accomplish its task within a specified time. It is not clear when the SPP function was officially terminated.⁸⁰

⁷⁸ For summary on effective way of establishing 'fullest truth' about serious violations, see Rotberg 2000, pp. 3–20; González and Varney 2013, p. 4; Bakiner 2014, pp. 6–30; Clark 2009, pp. 463–487.

⁷⁹ Article 4 of the SPP Proclamation.

⁸⁰ In 2010, the Chief Prosecutor presented a Report to the Parliament on the SPP's overall activities. Probably that was the time when the SPP ended its 18 years or so activities. See Chief Prosecutor Special Prosecutor Girma Wakjira Report to the Parliament Part I (in Amharic)

It was for the SPP itself to gear itself up for its work and to determine when it would commence with the prosecution of *Derg* officials. The personnel and officials who staffed the SPP were not appointed until the end of 1992, and the Office was not properly staffed until early 1993.⁸¹ In September 1992, the Council of Representatives on the recommendation of the Prime Minister appointed, a month after the establishment of the SPP, Girma Wakjira, an Ethiopian, as the Chief Prosecutor.⁸² The Chief Prosecutor was accountable to the Prime Minister.⁸³ Although the law set out the procedures for the appointment of the Chief Prosecutor and his deputy, it did not prescribe the eligibility criteria. However, for other special prosecutors and assistants, the law plainly set out the criteria. Accordingly, the candidate to be appointed as the Special Prosecutor of the Office had to be: (a) an Ethiopian citizen; (b) someone who was loyal to the Transitional Charter; (c) a qualified lawyer or someone with broad legal skills acquired through experience; (d) distinguished through diligence, integrity and good conduct; (e) someone who did not participate in the offenses that he or she would prosecute; and (f) someone who had not been a member of the *Derg*-WPE.⁸⁴ Although some of the criteria are difficult to ascertain, others are quite clear. For instance, the Special Prosecutor could not be a foreign national, nor could he be an Ethiopian national who had been a member of the Workers Party of Ethiopia.

Until the mid-1990s, the country had only one Law School which produced very few law graduates. During the Mengistu regime, most of the few trained and experienced lawyers were either killed or forced to flee the country. The remaining few were themselves involved in the serious violations committed by the Mengistu regime or were members of the WPE. This made them ineligible to be appointed as special prosecutors. During the transition, too, there were very few experienced Ethiopian lawyers who could be appointed as special prosecutors.⁸⁵

Despite the lack of trained and experienced Ethiopian prosecutors, the Ethiopian Government decided to use only Ethiopian prosecutors to deal with *Derg* crimes.

available at <http://www.ethiotube.net/video/8192/Documentary-findings-of-human-rights-abuses-during-Red-Terror-era-Part-1>. Accessed 20 June 2016. See also The Chief Prosecutor Girma Wakjira's Report to the Parliament Part II (in Amharic) available at <http://www.ethiotube.net/video/8194/Documentaryfindings-of-human-rights-abuses-during-Red-Terror-era-Part-2>. Accessed 20 June 2016.

⁸¹ The SPP Report 1994, p. 4.

⁸² Haile-Mariam 1998/99, pp. 691–92.

⁸³ Article 2 of the SPP Proclamation. It is not clear why the Office, which was established by the law-making organ, was made accountable to the executive organ. The Chief Prosecutor's accountability to the Prime Minister can be justified based on his Ministerial rank. Even though, the law that established the SPP did not explicitly confer the rank of minister on the Chief Prosecutor, he was given the rank of Minister. This is perhaps why in 2010; he presented a report to the Parliament about the activities that the SPP had carried out.

⁸⁴ Article 5 of the SPP Proclamation. See also Regulations 72 of 2001. The Regulation dealt with the rights and duties of the Special Public Prosecutors. It was more like labor law (and a code of conduct).

⁸⁵ The SPP Report 1994, p. 15.

Accordingly, the Special Prosecutors were appointed by the Prime Minister upon nomination by the Chief Prosecutor, *Girma Wakjira*, in early 1993.⁸⁶ The appointment of *Girma Wakjira* as the Chief Prosecutor was criticized because not only had he been a prosecutor under the *Mengistu* regime,⁸⁷ but also was considered to be as a sympathizer, if not a member of the EPRP; the party that faced the first blow of the terror during the *Derg* rule.⁸⁸

The law did not specify the number of the SPP's staff members. In practice, the Office of the SPP had about more than 400 employees, including investigators and support staff.⁸⁹ Of this number, about 45 were Ethiopian prosecutors and eight were foreign advisors.⁹⁰ For the collection and cataloguing of the evidence, the Office structured itself into four units:⁹¹ (a) Red Terror; (b) War crimes; (c) Main offenders or High officers of the *Derg*; and (d) forced relocation and misuse of aid.⁹² The law that established the SPP did not create the divisions; it was the Office that structured itself that way.

After it was staffed with necessary members and structured into four teams, the SPP became operational and started investigating serious human rights violations committed during the *Derg* rule. While the SPP took about three years to prepare the criminal charges, the approximately 2,000 detainees who had been arrested by the EPRDF forces at the time of the toppling of the *Derg* or thereafter, waited to be charged. It was especially the collecting, organizing, analysing and archiving of tens of thousands of *Derg* documents that overwhelmed the SPP, with its limited resources and funding. In its early years, the Office faced huge financial constraints. It was only in early 1994 that the SPP got funding from several countries and organizations.⁹³ Following the release of funding and support by the international

⁸⁶ It is stated that some of the prosecutors were fresh graduates who had just came out of the law school. Human Rights Watch 1994, pp. 16–17. See also Vaughan 2009, p. 51.

⁸⁷ He had been a prosecutor under the *Mengistu* rule; served as prosecutor: in the High Court (1979–85), the Supreme Court (1986–89), and the Court of Cassation (1989–91). *Girma Wakjira* was appointed as Vice-Minister of Justice during the transitional period (1991–92). See Human Rights Watch 1994, p. 15; Vaughan 2009, p. 51.

⁸⁸ The former opposition Member of the Parliament, the Honorable Lidetu Ayalew, criticized the Chief Prosecutor for showing personal bias and using emotive words during the latter's presentation of the SPP's report to the Parliament in 2010.

⁸⁹ Human Rights Watch 1994, p. 16.

⁹⁰ Human Rights Watch 1994, p. 16; Vaughan 2009, p. 52.

⁹¹ Kidane 2002, p. 672; Human Rights Watch 1994, p. 11.

⁹² Mayfield states that 'there is a fifth team which has been gathering evidence on the structure of the government and the security and military forces in an attempt to see how this structure was used to carry out the human rights abuses. Two additional groups provide support to all of these areas; one support group is responsible for obtaining the government documents relevant to the investigation; and the other group is charged with creating a computer system that will catalogue and make easily available all the information collected by the SPP.' Mayfield 1995, p. 564.

⁹³ The SPP Report 1994, pp. 12–13; Human Rights Watch 1994, p. 16. It received funding from USAID, the Swedish International Development Authority, Norway, Denmark, The Netherlands, Canada and France. The Office operated with a budget of about 200,000 USD.

community, the SPP expanded its evidence gathering operation, attempting to fast-track the laying of charges against the detainees.

Until early 1994, the SPP was still collecting evidence. The Mengistu regime was meticulous in keeping records about all sorts of activities, including orders of summary execution and arrest. Due to the lack of time, the Mengistu regime was unable to destroy or blot out the huge number of documents containing what would subsequently turn out to be incriminating documentary evidence. Thus, the SPP did not so much face the problem of getting hold of the documentary evidence, as it did the daunting task of gathering, organizing, cataloguing and entering the documents into databases. The Office collected more than 250,000 pages of government documents, ranging from minutes of officials meetings, *kebele* documents, politburo documents, death warrants, and military orders on the basis of which summary executions, torture and/or arbitrary arrests had been carried out.⁹⁴ Overall, the SPP gathered documents which were the *Derg* officials own making that bore indisputable signatures and stamps of the officials in the higher echelons of the *Derg* regime. For instance, the SPP had the minutes of the meeting of *Derg* officials at which each member discussed the fate of former officials of Haile Selassie regime and decided by a vote to execute them summarily.⁹⁵ The Office also got hold of the order of execution signed by Mengistu. Furthermore, the Office also had documentary evidence in the form of directives issued by the *Derg* for the elimination of opponents, reports of the summary executions on a day preceding the May Day demonstration of 1976, and of several other executions during the Red Terror.⁹⁶ The Office also had documents which the *Derg* officials themselves produced, showing the political nature of the forced relocation during the famine in which 100,000 people lost their lives due to the regime's policy.⁹⁷ Apart from this, the Office also gathered an immense amount of audiotapes and videotapes of torture sessions and summary executions. Although the SPP had colossal heaps of documentary evidence, which by itself would have secured criminal conviction of the accused, the Office, in addition, took the testimonies of large numbers of witnesses. The Office took statements from over 10,000 witnesses.⁹⁸ Moreover, the Argentinian Forensic Anthropology Team experts also assisted the SPP in the process of gathering evidence, especially by exhuming dozens of mass graves in different parts of the country.⁹⁹ The experts conducted the excavation and

⁹⁴ The SPP Report 1994, p. 15. According to Vaughan, the collected government documents were 309,778 pages by mid-1994, see Vaughan 2009, p. 55; but Mayfield stated that 309,215 pages of relevant government documents were collected by December 1994, see Mayfield 1995, p. 564.

⁹⁵ See the SPP Report 1994, p. 2.

⁹⁶ Mayfield 1995, p. 565; Human Rights Watch 1994, pp. 22–23; the SPP Report 1994, pp. 2–3.

⁹⁷ The SPP Report 1994, p. 3.

⁹⁸ See the Special Public Prosecutor's Office 2010. In 1994, Human Rights Watch reported that about 5,000 witnesses were interviewed by the SPP; see Human Rights Watch 1994, p. 24.

⁹⁹ The Argentinian Forensic Expert Team or *Equipo Argentino de Antropología Forense* (EAAF) was first contacted by the Carter Centre to assist the SPP in the exhumation of graves for the cases under the SPP's investigations. The missions of the team were divided into four. In its first mission

exhumation of graves, which contained the remains of *Derg* victims, in the military intelligence compound near Kotebe on the outskirts of Addis Abeba, Hawzein Tigray, where systematic bombardments of civilians at a daylight market took place—a war crime, Butajira and Alaba Kulito.¹⁰⁰ For instance, in the Kotebe case, the team of experts, basing their findings on the exhumed skeletons and information from families relating to the *ante mortem* circumstances of the victims, identified 30 individuals who were victims of extra-judicial executions. The team testified in court on their findings and displayed in the courtroom during the trial the physical evidence, which consisted of 30 identified skeletons, ligatures, blankets and other associated articles.¹⁰¹ As stated in their report, the findings of the forensic team helped the SPP to disclose with certainty to the families of the victims what happened to their loved ones, thus enabling them to conduct the burial of the remains according to customary practices. Importantly, the findings of the team played a pivotal role in helping the SPP to map the mass graves throughout Ethiopia.¹⁰² In general terms

not since Nuremberg has such documentary evidence been assembled suggesting the degree of complicity on the part of senior government officials. In many instances, there were verbatim transcripts made of critical meetings. There are over 200 volumes of these transcripts as well audio tapes of many of these meetings.¹⁰³

The voluminous trove of documentary evidence collected by the SPP was made the *Derg* officials; its probative value could not be contested successfully by the accused themselves. As will be shown in Chap. 5, the SPP did not face evidentiary problems. The mass of relevant documentary evidence and testimonies of witnesses helped the SPP to successfully prosecute the *Derg* officials. This makes the Ethiopian processes of bringing *Derg* officials to book similar to that of the

of August 1993, two members of the EAAF travelled to Addis Ababa for researching and inspecting several burial grounds. In its second mission, which took place between 13 January and 26 April 1994, the team carried out exhumations in two sites. In this mission there were eight foreign experts, namely, Dr Clyde Snow, as a representative of Physicians for Human Rights; Patricia Bernandi; Luis Fondebrider; Carlos Somigliana; Anahi Ginarte; Mercedes Doretti, as members of the EAAF; Claudia Bernandi, an independent consultant; Jose Pablo Baraybar, as an independent physical anthropologist invited by the EAAF; and five local experts: Abeba Debotch, technician in pathology; Dr Tamru Melese, pathologist; Ato Tekel Hagos; archaeologist; Kelemua Arya, archaeologist, and Gibron Melese from the police department. This team worked on the Kotebe and Hawzein cases. The third mission gave forensic assistance for the case under the SPP's investigation in 1996. In 2002, the EAAF team travelled to testify on their findings. For more see EAAF Biannual Report: Ethiopia 1994–1995 available at http://www.eaaf.org/cr_ethiopia/. Accessed 16 June 2016.

¹⁰⁰ Vaughan 2009, p. 56; Mayfield 1995, p. 565.

¹⁰¹ EAAF Annual Report: Ethiopia 2002, pp. 67–68. Available at http://eaaf.typepad.com/cr_ethiopia/. Accessed 15 June 2016.

¹⁰² EAAP Report: Ethiopia 1996–97, pp. 80–81.

¹⁰³ Mayfield 1995, p. 565.

Nuremberg trial,¹⁰⁴ an African Nuremberg. However, unlike the Nuremberg trial, the SPP introduced a large number of witnesses in the trials.¹⁰⁵ In Nuremberg ‘thirty-three witnesses gave evidence orally for the prosecution against the individual defendants, and sixty-one witnesses, in addition to nineteen of the defendants, gave evidence for the defence.’¹⁰⁶ On the contrary, in the Red Terror trials about 8,000 state witnesses testified. For instance, in the case of *Mengistu et al* alone, over 700 state witnesses and over 62 defense witnesses testified.¹⁰⁷ It has to be born in mind; however, that the Red Terror Trials involved enormous number of cases and a wider array and larger number of accused.¹⁰⁸

4.3.2 *The Judiciary and the Office of the Public Defender*

Ethiopia had no democratic heritage let alone an independent and well-functioning judiciary that serves as a watchdog of the executive organ’s actions against its citizens. In other words, the courts were never free from interference by the executive organ of state. During the reign of Emperor Haile-Selassie, the courts were under the control of the Emperor through the instrumentality of the Imperial Court over which he presided. The Imperial Court was the highest court presided over by the Emperor. Likewise, under the *Derg* regime, the judiciary was under the control of the executive.¹⁰⁹ In fact, during the reign of the *Derg*, apart from the fact that the judiciary was not independent, the ordinary courts were rendered useless, as there was no functional judiciary. Instead, special courts were set up, the essential function of which was to rubber-stamp the decisions of the executive organ and to serve as a camouflage for the sweeping summary executions that were carried out by order of the executive.¹¹⁰ Later on, the *Derg* regime did not even bother to bring

¹⁰⁴ The IMT in its verdict noted that: ‘The case, therefore, against the defendants rests in a large measure on documents of their own making, the authenticity of which has not been challenged except in one or two cases.’ Nuremberg Military Tribunal, *United States et al v Hermann Wilhelm Göring et al* in Trial of the Major War Criminals before the IMT, Nuremberg, 14 November 1945, § 412.

¹⁰⁵ *United States et al v Hermann Wilhelm Göring et al* in Trial of the Major War Criminals before the IMT, Nuremberg, 14 November 1945, § 412, and see infra Sects. 5.2 and 5.3.3.

¹⁰⁶ *United States et al. v Hermann Wilhelm Göring et al.* in Trial of the Major War Criminals before the IMT, Nuremberg, 14 November 1945, § 412.

¹⁰⁷ For a discussion on the number of witnesses adduced in the Red Terror trials, see infra Sect. 5.3.3.

¹⁰⁸ Infra Sect. 5.2.1.

¹⁰⁹ Proclamation 127 of 1979; and later replaced by Proclamation 8 of 1988.

¹¹⁰ Shortly after taking over the governmental authority, the *Derg* established a ‘Special Court Martial’ in 1974. This Court had jurisdiction over vaguely defined political crimes under the Special Penal Code 8 of 1974. The head of state appointed the judges and prosecutors of the Special Court Martial. See Articles 2 and 3, Proclamation 7 of 1974. In 1981, the Special Court replaced the former, with no significant difference in terms of structure, jurisdiction, and impartiality. See Proclamation 215 of 1981 and Proclamation 214 of 1981.

opponents before its kangaroo courts; instead, it embarked on a campaign of ferreting out its enemies and having them killed on the spot without any semblance of justice. As rightly observed, ‘the courts and other state institutions virtually stopped functioning except as tools for the war effort.’¹¹¹

The Transitional Government inherited from the *Derg* feeble, if not wholly dysfunctional, state institutions, such as the judiciary, which was the worst of all the collapsed state machineries. During the transition, Ethiopia had no functional administration of justice since the judiciary had literally been out of operation—there was a wholesale collapse of the judiciary. The judiciary was destroyed during the *Derg* reign. Many erstwhile judges were either killed during the terror or fled the country. Those who remained were sympathizers of the *Derg* or were forced to become puppets of the Mengistu regime. The Transitional Government had only a handful of experienced lawyers. Needless to say, establishing a new judicial system was necessary in order to bring the detained *Derg* officials to book.

The Transitional Period Charter had called for the establishment of independent courts but that did not come to fruition until 1993. Although the Transitional Government had made a policy decision to prosecute *Derg* officials and to establish the SPP in 1992, it did not create a new judicial system. That meant that even if the SPP was operational and ready to prosecute the detainees, it could not do so because there was no court system in operation.

In 1993, the Transitional Government established three levels of regular courts at both the central and regional levels.¹¹² The central level consisted of three judicial tiers, namely, Courts of the first instance, the High Court, and the Supreme Court.¹¹³ Parallel tiers of courts were established in the regions.

The central courts have first instance jurisdiction over criminal matters, the regional courts exercise jurisdiction over crimes only by way of delegation. Offences that were prosecutable by the SPP fell under the first instance jurisdiction of the Central High Court.¹¹⁴ The law delegated this jurisdiction of the Central High Court to the Supreme Courts at the regional level. Thus, the SPP filed all of its charges before the Central High Court (later renamed as ‘Federal High Court’) and Regional Supreme Courts.

Following the adoption of the 1995 Constitution and the establishment of the government, the courts were renamed.¹¹⁵ Except for the change in names, the present-day judicial structure is the same as that during the period of the

¹¹¹ International Human Rights Law Group Report, p. 7, as cited in Kidane 2002, p. 675.

¹¹² Proclamation 7 of 1992; Proclamation 40 of 1993; the Transitional Period Charter of Ethiopia.

¹¹³ Proclamation 40 of 1993.

¹¹⁴ Article 7 of Proclamation 40 of 1993 and the First Schedule of the Criminal Procedure Code 1961.

¹¹⁵ The FDRE Constitution states as follows: (1) ‘An independent judiciary is established by this Constitution. (2) Supreme Federal judicial authority is vested in the Federal Supreme Court. The House of Peoples’ Representatives may, by two-thirds majority vote, establish nationwide, or in some parts of the country only, the Federal High Court and First-Instance Courts it deems necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the

Transitional Government in terms of both the level of the courts and their subject matter jurisdiction. The adjective ‘Central’ before the names of courts at the Central level was replaced by the term ‘Federal’. Therefore, the names of courts at the Federal level are Federal First Instance Court, Federal High Court, and Federal Supreme Court.¹¹⁶ The same judicial hierarchy was established at the regional levels.¹¹⁷ Therefore, those cases that were filed before the Central High Court remained before the same court that was renamed as the Federal High Court; new proceedings brought after 1995 were filed before the Federal High Court and Regional Supreme Courts.

At the Federal level, from 1995 onwards, the Red Terror cases were filed before the First and Sixth Criminal Divisions of the Federal High Court, formerly the Central High Court. Although no special court was established for Red Terror cases, at the Federal level the two mentioned divisions were mainly reserved for the Red Terror cases. Nonetheless, these divisions cannot be considered as special chambers within the existing court that were established to deal with *Derg* crimes.¹¹⁸ Unlike the recently established Extraordinary African Chambers within the Courts of Senegal to prosecute former Chadian President, Hissen Hibre, all the judges of the two ‘Special Divisions’ were Ethiopian.¹¹⁹ Furthermore, there was no special law or statute enacted for the prosecution of the Red Terror cases. Cases of higher-level *Derg* officials were filed before those two Divisions of the Central High Court while the proceedings against the middle and lower level *Derg* officials were filed before the Regional Supreme Courts that were close to the scene of the crimes.¹²⁰

In addition to establishing the judicial system, the Transitional Government also established the Office of Public Defender (OPD). Based on the initiatives of the SPP and the Supreme Court, the OPD was established in January 1994.¹²¹ It was under the supervision of the Supreme Court. The OPD was established to provide legal assistance and representation for the indigent *Derg* accused officials. Senior *Derg* officials, who were persons of means, retained private counsel, unlike the subaltern officials or *kebele* leaders who had to rely on state-assigned counsel. Thus, the OPD

First-Instance Courts are hereby delegated to the State courts.’ Article 78(1) (2) of the FDRE Constitution.

¹¹⁶ Articles 2(4), 4, 8 and 12 Proclamation 25 of 1996; Articles 78-81 the FDRE Constitution.

¹¹⁷ Article 78(3) of the FDRE Constitution.

¹¹⁸ Haile-Mariam 1998/99, pp. 690–91.

¹¹⁹ Had the divisions been equipped with the necessary independent personnel, having only Ethiopian judges on the panel would not have been a problem. In other words, as long as the judges and their researchers are experts in the field of law they deal with and are independent of any interference, creating special division is not necessary.

¹²⁰ See *infra* Sect. 5.2.

¹²¹ Human Rights Watch 1994, p. 49; the SPP Report 1994, p. 15.

was meant to provide free legal representation for the lower echelon *Derg* officials.¹²² However, the OPD was staffed with very few and inexperienced attorneys.¹²³

To sum up, by early 1994, the Transitional Government had put in place machinery of justice to implement the criminal accountability mechanism that it adopted to deal with *Derg* crimes.

4.4 Habeas Corpus Petitions of Detainees

The detainees who had been arrested before or after the establishment of the SPP were held in custody for about two years, pending their being charged or released. According to the law, an arrested person must be brought before a court of law within 48 hours.¹²⁴ Should this not happen, the arrested person in police custody is entitled to file a *writ of habeas corpus*, meaning produce the body, before a court of law for the determination of the legality or otherwise of his detention.¹²⁵ The ICCPR states that ‘anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’¹²⁶ It is an accepted principle under Ethiopian law that a detained person should be brought before a court within a reasonable time, and on appearing before the court has the right to be told the specific alleged crimes for which he is arrested.¹²⁷

The law which established the SPP suspended the legal obligation of the state to bring an arrested person before a court within a reasonable time. *Habeas corpus*, therefore, did not apply to persons arrested before the coming into force of the SPP law for a grace period of six months starting from 8 August 1992, the date on which the law came into effect.¹²⁸ This means *Derg* officials who were arrested before 8 August 1992 could not avail themselves of *habeas corpus* applications before the Central High Court, which had subject matter jurisdiction over such applications, until 7 February 1993.¹²⁹ Over 2,000 suspected *Derg* officials were arrested before the coming into force of the SPP Proclamation. The suspension applied to these

¹²² Human Rights Watch 1994, p. 50.

¹²³ At the beginning the OPD had only one experienced trial lawyer and four fresh law graduates. See Human Rights Watch 1994, pp. 49–50.

¹²⁴ Article 177 of the Civil Procedure Code; Articles 29 and 60 of the Criminal Procedure Code of 1961.

¹²⁵ Article 177 of the Civil Procedure Code; Article 6 of Proclamation 40 of 1993.

¹²⁶ Article 9(4) of the ICCPR.

¹²⁷ Articles 29 and 60 of the Criminal Procedure Code of 1961; Article 19 of the FDRE Constitution.

¹²⁸ Article 8(3) of Proclamation 22 of 1992.

¹²⁹ Article 6(15) of Proclamation 40 of 93; Article 177 of the Civil Procedure Code.

suspects. However, with regard to the suspects who were arrested after 8 August 1992, the Office was subjected to the normal *habeas corpus* procedure.

By the time the SPP was staffed and became operational to investigate and gather evidence against the suspects, the grace period had already expired. After the period lapsed, the detainees who were in prison for up to 18 months flooded the Central High Court and the SPP with *habeas corpus* applications, challenging their detention. About 1,300 applications were heard by the Court from February to July 1993.¹³⁰ The Court ordered the unconditional release of 54 applicants and 130 applicants were released on bail.¹³¹ The SPP, which was overburdened by the applications, reviewed the evidence it had collected and released over 900 detainees on its own due to insufficient evidence against them.¹³²

In the cases where the SPP wanted to prolong the detention of some suspects, it applied for a grant of 14 days remand so that it could finalize the investigations and gather evidence against the detainees. Under Ethiopian law, 'where the police investigation is not completed the investigating police officer may apply for a remand for a sufficient time to enable the investigation to be completed.'¹³³ The maximum period of remand is 14 days, and the Office could apply for another remand after the expiry of the first period by justifying the need for the continued detention. Several detainees filed *habeas corpus* petitions after the expiry of the period of remand. To avoid the release of the detainees the Office applied for another remand on several occasions. This toing and froing caused a delay in the investigation processes; hence, the Central Supreme Court ruled that the SPP was not required to file charges within a short time, as was normally the case.¹³⁴ However, this ruling did not permit indefinite detention. Several human rights activists, including Amnesty International, criticised the continued detention of suspects for a prolonged period without any formal allegation. They pressurised the Office to file charges or release the detainees without delay. In spite of the critics of prolonged pretrial detention of the suspects, the Office continued with the investigation of the cases and formulation of charges until the end of 1994.

Additionally, the Office also meanwhile arrested more suspected *Derg* officials and applied for the extradition of several fugitive *Derg* officials who had fled the country as the EPRDF forces were approaching Addis Ababa. The Office succeeded in having extradited from Djibouti the notorious Melaku Tefera and Begashaw Atalay, both of whom were co-accused in the *Mengistu et al* case. However, many *Derg* officials, including ex-President Mengistu,¹³⁵ who reportedly fled to

¹³⁰ Human Rights Watch 1994, p. 19; Mayfield 1995, pp. 567–568.

¹³¹ Kidane 2002, p. 672; Human Rights Watch 1994, p. 19.

¹³² Human Rights Watch 1994, p. 19.

¹³³ Article 59(2) of Criminal Procedure Code of 1961.

¹³⁴ Human Rights Watch 1994, p. 20.

¹³⁵ In rejecting the Ethiopia's extradition request of Mengistu, Mugabe stated: 'As a comrade of our struggle [against white rule in former Rhodesia], comrade Mengistu and his government played a key and commendable role during our struggle for independence and no one can dispute that'; Bridgland, F Zimbabwe: Calls for Mengistu extradition available at <http://www.isn.ethz.ch/>

Zimbabwe, Kenya, the USA and the Italian Embassy in Addis Ababa remain at large.¹³⁶

After preparing the charges for two years, the SPP finally filed its first charge in October 1994, whilst most of the suspects had been in detention since May 1991. This means that most of the detainees, especially the first group had been in prison for about three years without any formal charges being laid against them.¹³⁷

Digital-Library/Articles/Detail/?lang=en&id=52764. Accessed 15 July 2016. See also Telegraph 2009.

¹³⁶ The SPP Report 1994, pp. 9–10. When the EPRDF army approached Addis, four senior *Derg* officials, namely, Tesfaye Gebre Kidan, Birhanu Bayeh, Addis Tedla and Hailu Yemanu, fled to the Italian Embassy in Addis. Hailu Yemanu committed suicide in June 1991 while Tesfaye reportedly died in a brawl with Birhanu (hit over his head with bottle). There is lack of detail and opaqueness around the causes of the death and the situation of the surviving convicts since the Italian officials are not willing to reveal the incidents, let alone to surrender them to the Ethiopian Government. Vice News 2015; BBC News 2005; All Africa 2004. The former Italian Ambassador to Ethiopia, Renzo Mario Rosso, in explaining why the officials are sheltered there stated that ‘the reason why they have been kept here in the compound of the Italian Embassy is because at the time they were sentenced to death. That is the reason why we could not simply give these people to the local authorities.’ He further stated that ‘the Ethiopian government knows very well that the two individuals have been living here for more than 20 years. Military and civilian personalities in the same condition have of course spent an equivalent number of years in jail; most of them have already been pardoned. The reason why they are still here is that the Ethiopian government believes they have not spent any time in jail. I am not here to make an argument on judicial terms, but my personal opinion is that of course we do not want to enter into internal domains so I do not make any consideration concerning the sentence of these people. But my simple way of putting things is that after all, these two people have spent 20 years here in a condition that is not normal. Perhaps it is not formally equivalent to a period of formal imprisonment but it is very similar because it could be considered house arrest and it is not actually a comfortable situation. Of course, they are being fed and there is an agreement now between the embassy and the families of these people, so they are currently providing their food. Actually, they have many limitations, limited possibilities to walk in the compound, only during their limited period access. Their situation is not different from an imprisonment, so on this base perhaps some sort of a solution could be found after more than 20 years. I understand that these two people may request pardon from the Ethiopian presidency because that is a procedure. I understand that this request must undergo a proper examination and [follow the] proper procedure. We are confident that we may finally find a solution on this element.’ In responding to whether they are allowed to be visited by their families, he said ‘they [families] come, but they come just two or three times a year, very limited access to the families. That is why I said it is not different from imprisonment. They are apparently in good health; of course they are aging.’ See the Reporter Interview with Ambassador Renzo Mario Rosso available at <http://www.thereporterethiopia.com/index.php/interview/item/1721-%E2%80%9C9Chuman-rights-are-an-important-part-of-the-development-of-one-country%E2%80%9D>. Accessed 30 July 2016.

¹³⁷ For a discussion on the prolonged pre-trial detention in the Ethiopian process of dealing with the *Derg* past, see *infra* Sect. 6.1.4.

4.5 Interim Conclusion

This chapter has discussed the approach that Ethiopia opted for reckoning with *Derg* crimes. In doing so, the chapter briefly outlined the general transitional justice mechanisms available to the transitioning states. From the various range of transitional justice mechanisms, the Transitional Government chose to embark on extensive investigations and prosecutions of *Derg* officials based on Ethiopian penal law. To give effect to this purpose, the SPP was established and mandated to carry out the tasks of investigating and prosecuting *Derg* officials. The SPP was also conferred with the corollary duty to establish and archive the historical records of the human rights violations committed under Mengistu's tyrannical rule. The Transitional Government did not establish a special tribunal or chamber for the adjudication of the charges against *Derg* officials, the cases were filed before the ordinary courts.

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Chapter 5

Criminal Accountability for *Derg* Crimes: Prosecution of Politicide



Abstract The state of commission has a duty to ensure accountability for the perpetration of horrendous crimes, such as, genocide and crimes against humanity. Following the fall of the military *junta* in 1991, the Ethiopian government attempted to dispense justice for the egregious crimes that were committed during the reign of the predecessor regime. In fact, the new government embarked on extensive investigation and prosecution of *Derg* crimes. This chapter focuses on the prosecution of *Derg* officials, particularly those who were in leadership positions, for the crime of politicide and other ordinary crimes. It shows that by and large the conviction of *Derg* officials for the crime of politicide has a legal foundation under the Penal Code of Ethiopia; hence it is not only justifiable but also fitting, given that crimes against humanity were and still are not criminalized as such.

Keywords *Derg* officials • Politicide • Genocide • Federal High Court • Conviction • Red Terror • Trials • Victims • Mengistu • Commission of genocide • Sentencing • Appeal

5.1 The Special Public Prosecutor's Investigation and Prosecutorial Strategy

As stated in the previous chapter, the Ethiopian government made a policy decision to bring suspected *Derg* officials to book in Ethiopia by using Ethiopian penal law, courts, prosecutors and defense lawyers. To this effect, the SPP, with a twofold mandate, was established. Unlike in normal criminal cases, the SPP carried out both the investigation and prosecution of suspected *Derg* officials. Ordinarily, the task of investigating cases and collecting evidence is the responsibility of the police or other investigating authorities.

After a two-year long investigation, the SPP started from late 1994 to file charges against three categories of *Derg* officials. The SPP's prosecutions were jurisdictionally delimited to suspected *Derg* officials. However, the prosecutions did not only involve serious crimes, nor were they limited to the high-level officials.

Rather, they involved serious and less serious crimes by both high level and lower ranking *Derg* officials. The section below analyzes the charges, objections to the charges, and verdicts of the Red Terror trials particularly with respect to the case of the *Mengistu et al* case.

5.2 Terror on Trial: The Red Terror Trials

The Red Terror trials are a collective name for the investigations and prosecutions of *Derg* officials by the SPP before the Ethiopian courts. In other words, the Red Terror trials were cases that involved the investigations and prosecutions of the military and civilian officials of Mengistu's regime for various crimes they had committed from 1974 to 1991. The crimes range from serious crimes, such as, genocide and war crimes, to less serious ones, such as, unlawful detention and abuse of power.¹ The SPP filed a total number of 365 Red Terror cases before the Federal High Court and Regional Supreme Courts.² Initially, 5,198 accused were charged in those cases.³ However, because of the protracted nature of the proceedings,⁴ some of the accused died before the start of the trials, while others escaped conviction and sentencing because of their natural death whilst the trials were underway.⁵

Approximately 8,000 prosecution witnesses testified and 15,214 pieces of documentary evidence were tendered during the trials.⁶ The SPP intended to call about

¹ The Special Public Prosecutor's Office 2010 (hereafter 'the SPP Dossier 2010'). See also the SPP Report 1994. The SPP Dossier is a 441-page long book that was published in Amharic. In the book, the Office briefly dealt with the structure of the *Derg* regime, *Derg* crimes, and the prosecution of the crimes. It seems that the book was written with the aim to fulfil the SPP's ancillary mandate of establishing an historical record. However, the book is nothing like the report of a truth finding body. This is so because what is included in the book is largely the brief outline of matters that were part of the courts' archive. The book is not easily accessible.

² The SPP Dossier 2010 Annex, Table II.

³ The SPP Dossier 2010 Table, II; Elgesem and Aneme 2009, p. 37. Since the SPP's investigations and operationalization of the whole accountability processes took longer than expected, some *Derg* officials avoided accountability through death before the SPP laid charges against them. These include: General Getachew Shibashi; Major Ali Musa ('the butcher of Bale'); Lieutenant Colonel Daniel Assefaw; Major Yohannes Mitiku, and Major Biranu Kebede. See SPP Dossier 2010, Annex, Table IV.

⁴ On the plausible reasons for the delay, see *infra* Sect. 6.2.4. The confrontation of terror before Ethiopian courts was at the beginning reported by several international media outlets although that gradually waned away. YouTube 2015, 2016; IOL 2006; BBC News 2006. The Independent 2006; The Irish Times 2006; The Washington Post 2006.

⁵ Colonel Teka Tulu, Colonel Demese Deresa Tulu, Colonel Negash Dubale, General Seyume Mekonnen, Colonel Negatu Gebre-Tsadek, Fantaye Yedego, Colonel Aragaw Eshete, Nuguse Fanta, and Mamo Ejigu were some of the senior *Derg* officials who died during the proceedings after the criminal charges were laid against them. The SPP Dossier 2010, p. 141 and Annex, Table IV.

⁶ The SPP Dossier 2010, Annex, Table II.

16,107 witnesses.⁷ However, due to several factors, such as death or illness of some witnesses, as well as time constraints, more than half of the listed witnesses did not testify. In October 1994, the SPP filed its first Red Terror case before the then Central High Court against an initial list of 106 high-level officials, including ex-President Mengistu, 72 high-ranking *Derg* members, and other high-level non-*Derg* member officials. The *Mengistu et al* case is the high profile Red Terror trial. The details of the indictment, motion to dismiss, the verdict and other issues related to this case are discussed at length below.

5.2.1 *The Accused*

The SPP grouped all accused into three categories based on their level of participation in the commission of the alleged crimes.⁸ These were:

- (a) Top level perpetrators—146 policy and decision makers—these are the senior officials who planned and co-ordinated the perpetration of the crimes. The top commanders, heads of security, police, army and intelligence, fell within this category. The *Mengistu et al* case fell within this category of the most responsible accused.⁹ The cases against these most responsible accused were first filed before the Central High Court and later moved to the First Criminal Division of the Federal High Court following the renaming of the courts in 1996¹⁰;
- (b) Middle level perpetrators: These included 2,433 military and civilian field commanders who carried out and transmitted orders issued by the first group or who issued their own orders. The members of investigation centres and revolutionary committees are some of the groups which fell within this category; and
- (c) Lower level perpetrators: These are 2,619 material offenders who directly executed the material elements of the alleged crimes. These were, for example, members of the special forces and death squads.¹¹ The cases against the last two categories of accused were filed before the third and sixth criminal Divisions of the Federal High Court and Regional Supreme Courts. The Regional Supreme Courts before which the cases were filed were: the Amhara

⁷ Ibid.

⁸ The SPP Dossier 2010, pp. 170–71. See also Kidane 2002 p. 677; Howland 2000, p. 426; Elegsen and Aneme 2009, pp. 3 and 37.

⁹ The other cases which fell within this category are, among others, Federal High Court of Ethiopia, *Special Prosecutor v Debela Dinsa et al*, Criminal File No. 912/89; Federal High Court of Ethiopia, *Special Prosecutor v Legesse Asfaw et al*, Criminal File No. 1264/93; Federal High Court of Ethiopia, *Special Prosecutor v Tesfayie Woldesilassie et al*, Criminal File No. 206/93; Federal High Court of Ethiopia, *Special Prosecutor v Melaku Tefara et al* Criminal File No. 03112/97.

¹⁰ The SPP Dossier 2010, p. 146.

¹¹ Howland 2000, p. 426; the SPP Dossier 2010, pp. 170–171.

Regional Supreme Court in Behar Dara and Dessie; Oromia Regional Supreme Court in Adama and Asosa; Southern Nation, Nationalities and People's Supreme Court in Hawassa and Arba Minch; Tigray Regional Supreme Court in Mekele; and Harari Supreme Court in Harar.¹²

Of the 5,198 accused who were initially indicted by the SPP, roughly 2,258 were charged before the Regional Supreme Courts.¹³ About 5,119 accused were tried fully, which means that their trials reached the conviction and/or sentencing stage.¹⁴ Of these, 2,188 were tried *in absentia*, while the remaining 2,931 appeared before the courts.¹⁵ In general, in the Red Terror trials, 3,583 *Derg* officials were convicted of heinous crimes and other ordinary crimes.¹⁶ Of the total number of convicted persons, about 1,100 were convicted for genocide against political groups and for other crimes.¹⁷

It is important to note, however, that in the Red Terror trials, not all the accused persons were found guilty as charged. A total of 659 accused persons who were present during the trials and another 880 who were tried *in absentia* were acquitted.¹⁸ Thus the trials did not end in across-the-board conviction of all those who were charged.

With regard to the penalties, 51 accused who were found guilty of committing serious crimes were sentenced to death.¹⁹ However, since the President, as required by law, did not approve the death penalties, they were never executed.²⁰ Instead of signing the death warrants, the President commuted them to life imprisonment for those who were in prison. Those who were sentenced *in absentia* and were not serving their sentences did not benefit from the Presidential commutation. In 2011, those who had served two-thirds of their sentences were released on parole.²¹ The other 182 accused were sentenced to rigorous terms of life imprisonment, while 313 were sentenced to between 20 and 25 years of rigorous imprisonment.²² Moreover, the rest of the convicts were sentenced to various prison terms, ranging from five to

¹² The SPP Dossier 2010, p. 134.

¹³ Stan and Nedelsky 2013, p. 170; Elegsen and Aneme 2009, p. 37. It is reported that 508 accused were charged before Amhara Regional Supreme Court; 198 before the Harari Supreme Court; and 402 before the Supreme Court of the Southern Nations, Nationalities and People's region. It has to be noted that some of the Red Terror trials that were filed before the Supreme Courts at the regional levels were conducted in the working languages of those regions. The Oromia Regional State and Tigray Regional State have Afaan Oromo and Tigrigna as their working languages, respectively. Thus, the trials in those regions were conducted in their respective languages.

¹⁴ The SPP Dossier 2010, Annex, Table II, No. 4.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ The SPP Dossier 2010, Appendix, Table III.

¹⁸ The SPP Dossier 2010, Annex, Table II, No. 4.

¹⁹ The SPP Dossier 2010, Annex, Table III, A.

²⁰ On the pardoning of the death sentences, see *infra* Sect. 5.4.

²¹ For more discussion on this, see *infra* Sect. 5.4.

²² The SPP Dossier 2010, Annex, Table III, B and C.

20 years.²³ Other penalties, such as restriction of political rights (for definite or indefinite periods depending on the sentences), were also imposed on those who were convicted of serious crimes.²⁴ Simply put, several convicts were barred from participating in elections and holding public office for life or for a specified period, depending on the severity of the penalties imposed on them.

5.2.2 *Victims in the Red Terror Trials*

The toll of victims of the Mengistu regime's human rights abuses is far from clear. As stated in Chap. 2 of this book, there are different estimates of the number of victims of the *Derg* crimes, ranging from a very cautious estimation of 5,000 to as much as 500,000.²⁵ Many, including the Red Terrors Martyrs Memorial Museum, echo the latter figure, which is an estimate made by Amnesty International.²⁶ On the basis of the Ethiopian courts' judgments in the Red Terror trials, 12,733 victims were identified and confirmed by the courts as victims of the Mengistu regime's egregious human rights violations.²⁷ Of this number, 9,546 were killed by the regime, and the remainder were confirmed as victims of torture and arbitrary arrest by the *Derg* regime.²⁸ The identified victims were from all age groups who were perceived or labeled as members or sympathizers of the Haile Selassie regime, opposition groups, and members of the Mengistu regime itself.

The number of victims confirmed by the judgments of the courts is, however, nowhere close to the actual number of victims of the 17 years of human rights violations by the Mengistu regime. Understandably, it is difficult to establish a comprehensive truth about the violations by using solely judicial mechanisms. To make a better estimate of the number of victims of the Mengistu regime, it would have been appropriate to use other possible truth finding mechanisms since the second mandate of the SPP was given little attention. Otherwise, using only judicial

²³ The SPP Dossier 2010, Annex, Table III, D.

²⁴ The *Mengistu et al* case, pp. 1069–1070.

²⁵ For an account on the number of victims during the *Derg* rule, see *supra* Sect. 2.5.

²⁶ The Red Terror Victims, Families and Friends Association established the Museum in 2008. It is located at Meskel Square near the place where Mengistu declared the official terror by performing the theatrical act of smashing three bottles filled with a blood-like substance. The official website of the Red Terror Martyrs Memorial Museum available at <http://rtmmm.org/>. Accessed 16 July 2016). In this piece, the Museum quoted the estimate of Red Terror victims available <http://rtmmm.org/hawelt1.html>. Accessed 16 July 2016. Inside the Museum, the estimation of Amnesty International was posted on the wall.

²⁷ The SPP Dossier 2010, Annex, Table II.

²⁸ *Ibid.*

mechanisms as a sole means of establishing the number of victims would be tantamount to running the risk of trivializing the actual number of victims who had suffered during the regime of the military *junta*.

The Ethiopian accountability mechanism did not include any reparation scheme for the identified victims. In other words, those individuals who were identified by the judgments of the courts as victims of the Mengistu regime's egregious human rights violations have not been given any sort of compensation. In September 1990, three victims of the Mengistu regime's arbitrary arrest and torture policy filed a civil suit before the United States District Court for the Northern District of Georgia against a *Derg* official called Kelbesa Negawo based on the Alien Tort Law Claims Act.²⁹ They claimed that Kelbesa, who was the President of Zone Nine in Addis Abeba during the Red Terror period, imprisoned and tortured them.³⁰ The Court awarded each victim \$200,000 as compensatory damages and \$300,000 as punitive damages.³¹ Kelbesa was ordered to pay a total amount of US\$900,000 to the three victims. His appeal against the judgment of the Federal District Court was unsuccessful.³² The victims' compensatory awards remained unenforceable since the judgment debtor was found to be insolvent. No similar civil suits have been filed by any Red Terror victims before Ethiopian courts, although, legally speaking, those who were identified as victims had the possibility to be awarded compensation based on the criminal convictions.³³ There has also not been any form of compensation whatsoever given to the identified victims thus far.

To sum up, the Red Terror trials comprised the extensive prosecution of an enormous number of *Derg* officials for various crimes, including politicicide. The trials were scattered throughout the country. They were based on Ethiopian laws and carried out on Ethiopian soil by using the Ethiopian criminal justice apparatus.

²⁹ United States Court of Appeals, Eleventh Circuit, *Hirute Abebe-Jira; Edgegayehu Taye; Elizabeth Demissie, Plaintiffs-Appellees v Kelbessa Negewo*, Defendant-Appellant, 72 F. 3d 844, decision of 10 January 1996. See also Smother Nightmare of Torture in Ethiopia Is Relived in an Atlanta Court, New York Times 1993. In Ethiopia, he was convicted *in absentia* and sentenced to life imprisonment by the Sixth Criminal Division of the Federal High Court in May 2002. In 2006, he was deported from the US to serve his life sentence. His deportation was due to violation of the US immigration law. Mekonnen 2013, p. 107. See Ethiopia Arrest Kelbessa available at http://nazret.com/blog/index.php/2006/10/22/ethiopia_arrests_kelbesa_negewo_at_addis. Accessed 17 July 2016.

³⁰ Trial Watch 2016, New York Times 2006. The victims who filed the civil suit were Hirute Abebe-Jira, Edgegayehu Taye, and Elizabeth Demissie.

³¹ *Hirute Abebe-Jira et al v Kelbessa Negewo*, 72 F. 3d 844, decision of 10 January 1996.

³² *Hirute Abebe-Jira et al v Kelbessa Negewo*, 72 F. 3d 844, decision of 10 January 1996.

³³ It is inconceivable for a victim to successfully claim damages in the near future because of the statute of limitation on possible civil suits against *Derg* officials.

5.3 The *SPP v Colonel Mengistu Haile-Mariam et al*: Filed First; Concluded Last

The SPP filed its first Red Terror case in late October 1994 before the Central High Court, and later, following the adoption of the 1995 Constitution, the case was moved to the First Criminal Division of the Federal High Court (FHC).³⁴ The *Mengistu et al* case is a high profile case as it was a case against policy and decision makers of the *Derg* rule—the first category of accused persons who bore the greatest responsibilities for their deeds. In this case, the SPP charged 106 high-level *Derg* officials, including 73 members of the *Derg*. Former President Mengistu as the alpha male among the accused in this case topped the list. The other accused that followed the list included Captain Fikre Selassie Wogaders (former Prime Minister), Major Fiseha Desta (former Vice President), Colonel Tesfaye Gebre-Kidane (Minister of defence until 1987, President for a week after Mengistu left for Zimbabwe), Hadis Tedla, Berhan Bayeh, Melaku Tefera, Debala Dinsa, and others.³⁵ The accused in this case represented a cross-section of the *Derg* leadership. The accused were charged collectively and independently with 212 alleged acts of inciting genocide, commission of genocide against political groups, arbitrary arrests, and abuse of power.³⁶ The charge against one of the co-accused, Tiruneh Habte-Selassie, was severed from those of the *Mengistu et al* trialists and he was charged in a separate case.³⁷ A significant number of accused died in the course of the unduly prolonged trial.³⁸ As in the *Milosevic* case, several defendants in the *Mengistu et al* case escaped conviction through death caused by natural causes. Of the initial 106 accused, only 54 were alive at the conviction stage of the proceedings.

In the instant case, 22 accused, including ex-President Mengistu, Tesfaye Gebrekidane, Hadis Tedla and Berhane Bayeh were charged, tried and sentenced in *absentia*.³⁹ Under Ethiopian criminal procedure law, trial *in absentia* is permissible

³⁴ *The SPP v Colonel Mengistu et al*, Charge, SPP Criminal File 401/94, October, 1994 as amended in 1995, and *The SPP v Colonel Mengistu et al*, First Criminal Division, Federal High Court, Criminal File 1/95.

³⁵ For the list of accused in the *Mengistu et al* case during the submission of the charge by the SPP to the Central High Court, see Annex Five.

³⁶ *The SPP v Colonel Mengistu Haile-Mariam et al*, Charge, October 1994.

³⁷ The SPP Dossier 2010, p. 141.

³⁸ The SPP Dossier 2010, p. 141.

³⁹ For a list of the accused who were tried *in absentia*, see Annexes Five and Six. At the outset, 26 individuals were charged *in absentia* but some of the accused died before the trial, whereas the charge against Tiruneh Haile Selassie was severed.

for some serious crimes.⁴⁰ The general principle is that the accused person must appear personally before the court in order to be notified of the charges against him and to defend himself.⁴¹ Thus, as a matter of rule, no accused can be tried in his or her absence. However, there is an exception to the general rule, and it is the following: When the accused person ‘fails without good cause to appear on the day fixed for the hearing, the court shall record his absence and may direct that he be tried in his absence.’⁴² Trial *in absentia* applies only to offences punishable by no less than 12 years’ rigorous imprisonment or for other offences specified by the law.⁴³ Since most of the offences with which *Derg* officials were charged are punishable by life imprisonment, trial *in absentia* could be resorted to where the accused failed to appear after having been duly notified of the impending court proceedings. What the courts are required to do is to issue and publish a summons in which the date fixed for trial must be indicated.⁴⁴ It is only after this that the hearing can continue in the absence of the accused as in ordinary cases.⁴⁵ As regards default judgment against the accused, the latter can apply for the setting aside of the judgment and for a fresh trial.⁴⁶ However, this option of applying for the setting aside of a judgment handed down in the absence of the accused did not seem to apply to the *Derg* officials who were tried *in absentia*. The reason is that for such application to be granted, either of the following conditions must be shown:⁴⁷

⁴⁰ Article 161 Conditions for trying accused person in his absence.

1. Where the accused fails without good cause to appear on the day fixed for the hearing, the court shall record his absence and may direct that he be tried in his absence in accordance with the provisions of this Section.
2. No accused person may be tried in his absence under the provisions of this Section unless he is charged with:
 - (a) an offence punishable with rigorous imprisonment for not less than twelve years; or
 - (b) an offence under Articles 354–365 Penal Code punishable with rigorous imprisonment or fine exceeding five thousand dollars.

⁴¹ Article 127 the Ethiopia’s Criminal Procedure Code 1961.

⁴² *Ibid.*, Article 161.

⁴³ *Ibid.*, Article 161(2).

⁴⁴ The law stated: ‘Where the court decides to hear the case in the absence of the accused it shall order the publication of the summons which shall show the date fixed for the hearing. It shall contain a notification to the accused that he will be tried in his absence if he fails to appear.’ Article 162 of the Criminal Procedure Code Proclamation 185 of 1961.

⁴⁵ *Ibid.*, Articles 162–163.

⁴⁶ *Ibid.*, Article 197. The application for setting aside the judgment rendered in default should be submitted to the court that delivered the judgment in question—Federal High Court in the instant matter. The law stated that: ‘Where the application is allowed under Article 199, the court shall order a retrial and the public prosecutor shall file the charge in a court having jurisdiction.’ Article 202(1) of the Criminal Procedure Code. However, once the application is dismissed, there is no appeal against it. The accused can lodge an appeal against the sentencing judgment within fifteen days from the time of dismissal of the application. See Article 202 of the Criminal Procedure Code. It is not clear why the appeal in such a case is limited to the sentencing decision.

⁴⁷ Article 164, Articles 197–199 of the Criminal Procedure Code 1961.

(a) That the accused must not have received a summons to appear; or (b) That he was prevented by *force majeure* from appearing in person or through an advocate. Besides, the application must be filed within 30 days from the time the accused became aware of the judgment handed down in his absence.⁴⁸

With regard to *Derg* officials who were tried *in absentia*, it is doubtful whether the above conditions could be met. Thus, legally speaking, there is no room for Mengistu and others to apply successfully for a revocation of the judgments handed down in their absence. Perhaps that is why some accused who were deported from different countries have been serving the sentences imposed on them *in absentia*.⁴⁹

Be that as it may, it is on the basis of this procedure that Mengistu and others were tried *in absentia*. The following part outlines the details of the charges.

5.3.1 The Indictment

The accused in the *Mengistu et al* case were charged collectively and independently on 210 counts of genocide and two alleged acts of other ordinary crimes.⁵⁰ The charges against them were categorized into four elements: (a) preparation and provocation to commit genocide; (b) commission of genocide; (c) arbitrary arrest; and (d) abuse of power.

5.3.1.1 Provocation and Preparation to Commit Genocide or Incitement to Politicide

The first charge laid against all the accused was provocation and preparation to commit genocide in violation of Article 32(1)(a)⁵¹ and Article 286 of the Penal Code.⁵² The Special Prosecutor accused all the trialists that they had incited the commission of genocide by openly calling for the decimation of those whom they had labeled ‘anti-revolutionaries,’ ‘anti-people,’ ‘reactionaries,’ and ‘anarchists’.⁵³ The accused faced charges of arming and authorizing their instruments of

⁴⁸ Ibid., Article 198.

⁴⁹ Kelebesa Negawo is one of those accused who were deported to serve the life imprisonment imposed on him *in absentia*. Nevertheless, some have applied for a fresh retrial or for setting aside the judgment rendered in their absence. While some of these applications were accepted, the other were rejected; for more on this, see *infra* Sect. 6.1.

⁵⁰ The *SPP v Mengistu et al*, Charges, Criminal File no. 1/94; the SPP Dossier 2010, pp. 131–143.

⁵¹ For a discussion on the modes, see *supra* Sect. 3.4.

⁵² The *SPP v Mengistu et al*, Charges, Criminal File No. 1/94 as amended, pp. 6–7. The pages of the case that the author cites in this work, unless otherwise indicated, correspond to the pages of the *Mengistu et al* case report as published by the Federal Supreme Court in 2009.

⁵³ *Mengistu et al* Criminal File no. 1/94, p. 7, the SPP Dossier 2010, p. 131.

repressions, such as *kebeles*, the revolutionary guards, *Seded*, and others to carry out genocidal acts against opposition groups. The charge read as follows:

All the defendants having established the Provisional Military Administration Council or government as of 12 September 1974, and having organized themselves into the General Assembly, Standing Committee, and Sub-Committees while administrating the country solely and collectively, agreed among themselves to commit, caused to be committed and support the commission of genocide against political groups that they had labelled as anti-people and anti-revolutionary. In order to realize their plan, they not only recruited and armed various *kefitegna* and *kebele* leaders, revolutionary guards, cadres and revolutionary comrades but also they incited and emboldened in public meeting halls, over the media by pointing out the names of members of political groups calling for their elimination using speeches, drawings and writings from 1975 to 1983 in various months and dates thereby causing the death of thousands of members of political groups in violation of Article 321(a) and Article 286(a) of the Penal Code.⁵⁴

Accordingly, the SPP charged all of them with the preparation to commit genocide and inciting the commission of genocide against political groups. In other words, the first charge did not encompass conspiracy to commit genocide.

5.3.1.2 Commission of Politicide: Genocide Against Political Groups

The second charge against the accused in the *Mengistu et al* case was the commission of politicide in violation of Article 32(1)(b)⁵⁵ and Article 281(a) and (c) of the Penal Code.⁵⁶ Under this second charge, the accused were charged with 209 counts of committing genocide. The charge sheet read as follows:

As of 12 September 1974, while exclusively (solely) and collectively leading the country by establishing the Provisional Military Administration Council or government, organising themselves as the general assembly, standing and sub-committees, the defendants in violation of Articles 32(1)(b) and 281 of the 1957 Penal Code of Ethiopia, jointly planned, and ordered the destruction in whole or in part, members of politically unified multinational society thereby committed genocide. To accomplish or implement this goal, they created various organs of investigation, torturing and execution, hit squads and *Nebelbal* army divisions that carried out ‘weeding out’ campaign or ‘clearing fields’, ‘free measures’ and ‘Red Terror’ to kill or cause the killings of members of political groups, or cause injury to their physical and mental health or cause their total disappearance by banishing them in a manner calculated to cause them social harm or cause their death.⁵⁷

The material elements of genocide with which the SPP charged the accused were killings of, causing serious injuries to, and inflicting destructive conditions of life on, members of politically unified multinational society. The SPP specifically

⁵⁴ The *SPP v Mengistu et al* Charges 1994, pp. 6–7 (translation by Tiba 2011, p. 169; Aneme 2009, p. 4 with a minor modification by the author of this book).

⁵⁵ Supra Sect. 3.4.

⁵⁶ The *SPP v Mengistu et al* 1994, pp. 7–229. The SPP Dossier 2010, p. 142.

⁵⁷ The *SPP v Mengistu et al* 1994, p. 7; the SPP Dossier 2010, pp. 141–142 (translation by Aneme 2009, p. 4; Tiba 2011, p. 170 with a minor modification by the author of this book).

charged them with: Killing 1,823 identified victims; causing bodily injury to 999 persons; and placing another 194 under living conditions calculated to result in death or enforced disappearance of the members of political groups.⁵⁸

Killings

The prosecutors alleged 171 acts of killing which resulted in the death of 1,823 members or sympathizers of political groups. Not all the accused were charged with these counts; it was only for the first 17 counts of killing that all the accused were jointly charged, while the first 12, including Mengistu, who were members of the *Derg*'s Standing Committee, were accused of committing all the 209 counts under this charge.⁵⁹

All the accused were charged with the first 17 counts of killing which allegedly resulted in the deaths of 240 identified victims who were labeled by the perpetrators as aristocrats, counter-revolutionaries, anarchists, members of the Ethiopian People's Revolutionary Party and members of the Ethiopian Democratic Union.⁶⁰ Among the identified victims under these counts were 59 Haile Selassie officials; Emperor Haile Selassie;⁶¹ and Brigadier General Tadesse Biru.⁶²

A total of 12 accused, including Mengistu, were charged with the remaining 154 counts of killing.⁶³ The 12 who were members of the Standing Committee, were the prominent figures in the *Derg*'s administration. They were accused of deciding on, and ordering the killing of, 1,593 people whom they had labeled as members of political groups, such as, the Ethiopian Peoples' Revolutionary Party, *MEISON*, the Ethiopian Democratic Union, the Oromo Liberation Front, the Tigray People Liberation Front, and other political groups.⁶⁴ The identified victims included

⁵⁸ The *SPP v Mengistu et al* 1994, pp. 7–103; the SPP Dossier 2010, pp. 141–142.

⁵⁹ The *SPP v Mengistu et al* 1994, pp. 7–229. At first glance the number of counts may seem long compared to the charges in ordinary criminal prosecution; however, by bearing in mind that the charges involve the commission of international crimes, where several individuals participate in the commission of a wide array of acts, the list could not be regarded as long. Recently, a former guard at Auschwitz, Oskar Göring ('accountant Auschwitz'), was charged with 300,000 counts of accessory to murder. CBS New 2015.

⁶⁰ The *SPP v Mengistu et al* 1994, pp. 7–17; the SPP Dossier 2010, p. 142.

⁶¹ The *SPP v Mengistu et al* 1994, Count 5.

⁶² The summary execution of the 59 former officials of the Haile Selassie regime was mentioned at the top (first count) of the list of the counts contained in the second charge, while the killing of the Emperor was the fifth count. Tadesse Biru, as one of the victims, was mentioned in count two of the second charge. See the *SPP v Mengistu et al* 1994, pp. 7–9.

⁶³ The *SPP v Mengistu et al* 1994, pp. 17–103; the SPP Dossier 2010, p. 142.

⁶⁴ The *SPP v Mengistu et al* 1994, Counts 17–171.

Patriarch Abune Tefelosiwos Gebre-Mariam,⁶⁵ Priest Gudina Tumsa,⁶⁶ Haile Fida,⁶⁷ Teferi Benti (the Chairman of the *Derg* after Aman was killed),⁶⁸ and Birhane Meskel Redea.⁶⁹

Causing Serious Bodily and Mental Injuries

Under this category the accused were charged with causing bodily harm and serious mental injuries to 99 people who were mentioned in three counts (counts 172–174) on account of the victims' alleged membership of the Ethiopian Democratic Union, Shabia, the Ethiopian People's Revolutionary Party, the Oromo Liberation Front, Woyane/the Tigray People Liberation Front or *MEISON*.⁷⁰ The prosecutor stated in the charge that the accused, after ordering the detention of members of the identified political groups, had fully associated themselves with inhuman and systematic acts of torturing the detainees.

Subjecting People to Destructive Conditions

From counts 175 to 209, the prosecutor charged the accused with placing 179 members of political groups in destructive conditions without access to food, medicine and other basic amenities.⁷¹ By doing so, the prosecutor alleged that they had subsequently caused the forced disappearance of the detainees, with no chance of them being traced. The prosecutor tried to link the subjection to destructive conditions to the forced disappearances.

⁶⁵ The *SPP v Mengistu et al* 1994, Count 91.

⁶⁶ The *SPP v Mengistu et al* 1994, Count 92. This count was later dropped due to insufficient evidence.

⁶⁷ The *SPP v Mengistu et al* 1994, Count 93.

⁶⁸ The *SPP v Mengistu et al* Charge, 1994, Count 38. The longest list of murdered victims was provided in Count 133 where the SPP alleged that 286 persons who had been labeled as members of the Ethiopian People's Revolutionary Party and the Ethiopian Democratic Union were killed.

⁶⁹ The *SPP v Mengistu et al* Charge, Count 129.

⁷⁰ The *SPP v Mengistu et al* Charge, 1994, pp. 87–90.

⁷¹ The *SPP v Mengistu et al* Charge, 1994, pp. 90–103.

Alternative to this second charge, the prosecutor, pursuant to the Criminal Procedure Code, charged the accused with aggravated homicide and the causing of grave physical injuries.⁷²

5.3.1.3 Illegal Detentions

Apart from the genocide charges, all the accused were charged with causing the unlawful detention of 2,394 alleged members of different political groups, in violation of Article 32(1)(b) and Article 416 of the Penal Code.⁷³

5.3.1.4 Abuse of Power

In the last charge against all the accused, the SPP alleged that they had violated Articles 32(1)(b) and 414 of the Code, and abused their positions by unlawfully confiscating Birr 11,521,206.15 and other personal properties of individuals.⁷⁴ The

⁷² Articles 522 and 538 of the Penal Code. The *SPP v Mengistu et al* Charges 1994, pp. 103–229. In this part, the Special Prosecutor charged the accused alternatively with aggravated homicide and causing serious bodily injuries. The legal basis for such alternative charging was the Criminal Procedure Code. Article 113 of the Criminal Procedure Code states that when it is doubtful as to what crime has been committed, the prosecutor can charge the accused ‘with having committed the offence which appears the more probable to have been committed and he may be charged in the alternative with having committed all other offences which the facts which can be proved might constitute.’ Even in a case where the prosecutor failed to alternatively charge the accused with a lesser crime, a court has the power to do a legal re-characterization of the charge for the lesser crime. The provision reads that: ‘Where the evidence shows that the accused committed an offence with which he might have been charged in the alternative and the offence is within the jurisdiction of the court, he may be convicted of such offence notwithstanding that he was not charged with it, where such offence is of lesser gravity than the offence charged.’ Thus, even if the Special Prosecutor did not alternatively charge the accused for aggravated homicide and causing injuries, the court had the legal authority to convict the defendants for lesser crimes, including aggravated homicide, as genocide is more serious in nature than other ordinary crimes.

⁷³ The *SPP v Mengistu et al* 1994, Charges 1994, p. 229. Article 416 of the Penal Code on the basis of which this charge was based read as follows: ‘Any public servant who arrest or detains another except in accordance with the law, or who disregard the forms and safeguard prescribed the law, is punishable with rigorous imprisonment not exceeding five years, and fine.’

⁷⁴ The *SPP v Mengistu et al* Charges, 1994, p. 229. The provision on Abuse of Power read as follows:

- ‘(1) Public servants who with intent to procure for themselves or another an unlawful advantage or to do injury to another:
 - (a) apart from the cases especially provided for below, misuses their official position or the powers proper to their office, whether by a positive act or a culpable commission; or
 - (b) exceed the power with which they are officially invested; or are punishable with simple imprisonment or fine except where a specific provision prescribes a more severe penalty.’

SPP alleged that the accused had labeled the owners of the properties as counter-revolutionaries who tried to sabotage the economy and thereby ordered the dispossession of their properties without an order of court.

5.3.2 *The Trial: Heads of State and Government on Trial*

Under the Ethiopian Criminal Procedure Code, upon submission of the charges, what normally follows is the trial stage.⁷⁵ In other words, what is recognized in other legal systems and under the statutes of international courts as confirmation of charges is part of the trial stage under Ethiopian law. The trial of *Mengistu et al* began on 13 December 1994. As required by the law, the accused (most of them) were arraigned before the Court and the latter recited the 277-page long charges to those defendants who were present in the courtroom.⁷⁶ The full recitation of the incitement and commission of politicide; arbitrary arrests; and abuse of power charges took three days.⁷⁷ Following the recitation, the defense counsels for the accused applied for a motion to dismiss the charges and made preliminary objections against the charges.⁷⁸ The Court adjourned to give counsels enough time to study the charges and make their formal objections to the Court. On 7 March 1995, the counsels for the defense submitted their objections. On 23 May 1995, the Prosecution rebutted the preliminary objections, arguing against the motion to dismiss the charges.⁷⁹ Below, the details of the objections and rebuttal submissions are discussed.

5.3.2.1 **Motions to Dismiss the Charges and the Special Public Prosecutor's Rebuttal Responses**

On 7 March 1995, the counsels for the 45 accused who were in prison filed preliminary objections before the Central High Court against the charges of their

⁷⁵ Articles 123 *et seq* of the Criminal Procedure Code. The stages of regular criminal proceedings under the Ethiopian laws are: (a) Communication of commission/omission of crime to the investigating authority (usually police). However, in the Red Terror cases, the investigations were carried out by the SPP; (b) Investigation stage; (c) Prosecution (framing and submission of charge); (d) Trial (includes reading the charge to the accused by the court; preliminary objections and ruling on same, if any; confirmation of charge; production of evidence by the prosecution; ruling on the charges; and asking the defense counsel to enter defense, if necessary); (e) Judgment (conviction/acquittal and sentencing); and (f) Appeal.

⁷⁶ Article 29 of the Criminal Procedure Code 1961.

⁷⁷ The SPP Dossier 2010, p. 146.

⁷⁸ *Ibid.*, p. 140, Mayfield 1995, p. 567.

⁷⁹ Mayfield 1995, p. 567.

respective clients.⁸⁰ The objections range from challenging the authority of the Transitional Government, the validity of the Penal Code, immunity, statute of limitations, a request for their case to be tried by an international court, the acts authorized by law, the nature and organization of the charges, to technical objections, such as, misuse of the accused persons' titles in the charges.⁸¹ The discussion below is confined to the preliminary objections that related to substantive issues, leaving aside those involving technical matters. It describes the SPP's rebuttal responses as well.

Objection Related to the Transitional Government's Authority and the Charter

The defense counsels contested the Transitional Government's authority to investigate and prosecute *Derg* officials.⁸² Apart from this, they argued that, even if it was to be assumed that the Transitional Government had the power to prosecute *Derg* officials, it did not have the authority to extend the transitional period beyond 1993. This argument was made in view of the Transitional Charter. It was stated in the Charter that the Transitional Government had to hand over power to the legitimately elected government within two years. At the time the SPP was filing its first charge, this grace period had already expired. Hence, the defense counsels argued that the SPP had no mandate to bring charges against their respective clients.⁸³

The SPP responded to these arguments by stating that the Transitional Government of Ethiopia was the legitimate government that was empowered to carry out all governmental activities.⁸⁴ The law bluntly stated that 'the Transitional Government shall exercise all legal and political responsibility for the governance of Ethiopia until it hands over power to a government popularly elected on the basis of a new constitution.'⁸⁵ The Transitional Government was the internationally recognized legitimate authority that represented the state of Ethiopia at the UN and in other international organizations. Therefore, the Transitional Government not only had the authority to bring the *Derg* officials to book, but it also had the duty to

⁸⁰ The *SPP v Mengistu et al* Preliminary Objection presented by the Defense Counsels 1995. The *SPP v Mengistu et al*, Reply to the Counsels for the Accused's Objections, SPP Investigation File No. 401/93, submitted 23 May 1995. (Hereinafter 'the SPP Reply to the Objections'), Aneme 2009, p. 6.

⁸¹ The *SPP v Mengistu et al*, Preliminary Objection Presented by the Defense Counsels 1995, the SPP Reply to the Objections 1995.

⁸² The *SPP v Mengistu et al*, Preliminary Objection presented by the Defense Counsels 1995. See also Aneme 2009, p. 7.

⁸³ Article 12 of the Transitional Period Charter.

⁸⁴ The SPP Reply to the Objections 1995, p. 15. The Transitional Period Charter in its Part Three stated the composition and power of the Transitional Government, Articles 6–9.

⁸⁵ Article 8 of Transitional Period Charter.

do so. The SPP also added that, as long as there was no publicly elected entity that could replace the Transitional Government, the latter had the authority to continue carrying out governmental functions. Further, so the argument ran, the power to establish the SPP emanated from the international duty to bring to book violators of human rights.⁸⁶ Consequently, the SPP argued that:

Since the charge filed by the Special Prosecutor Office has emanated from the power and duty of the Ethiopian Transitional Government to bring offenders before court in accordance with international and internal law objecting such a measure ha[d] no legal ground.⁸⁷

Hence, the SPP pleaded to the Court for dismissal of the objection.

Immunity

The counsels for the accused stated that the accused were members of the *Derg* which, in its collective capacity, performed the function of ‘head of state’ from 1974 to 1991.⁸⁸ Defense counsels objected, arguing that what their clients were accused of were ‘acts of state’ and on that basis, their clients were absolved from any kind of responsibility.⁸⁹ In other words, the defense counsels submitted that the acts of their clients were carried out in their capacity as a collective head of state; consequently, on the basis of Article 4 of the 1955 Constitution⁹⁰ and Article 2137 of the Civil Code,⁹¹ they were entitled to immunity from criminal prosecution.⁹²

The SPP responded to the immunity objection by arguing that the accused were members of the *Derg* only, and not a head of state.⁹³ The SPP argued that on the basis of the first law enacted by the accused—the *Derg*—it was the Crown Prince, His Highness Merid Azmatch Assefa Wossen, who was the King and Head of State of Ethiopia.⁹⁴ The SPP further stated that the second proclamation enacted by the *Derg*, provided that the PMAC shall discharge the functions of the Head of

⁸⁶ The SPP Reply to the Objections 1995, p. 15.

⁸⁷ The SPP Reply to the Objections 1995, p. 16.

⁸⁸ The *SPP v Mengistu et al* Preliminary Objection presented by the Defense Counsels 1995; the SPP Dossier 2010, p. 147; Aneme 2009, pp. 9–10.

⁸⁹ The SPP Dossier 2010, p. 147.

⁹⁰ The provision of the 1955 Constitution read that ‘by virtue of His Imperial Blood, as well as by the anointing that He has received, the person of the Emperor is scared, and His dignity is inviolable and His powers indisputable. He is consequently entitled to all honors due to Him in accordance with tradition and the present constitution. Any one so bold as to seek to injure the Emperor is punishable.’

⁹¹ Article 2137 of the Civil Code reads as follows: ‘No action for liability based on an offence committed by Him may be brought against His Majesty the Emperor of Ethiopia.’

⁹² The SPP Dossier 2010, p. 147; the SPP Reply to the Objections 1995, p. 9.

⁹³ The SPP Reply to the Objection 1995, p. 9, the SPP Dossier 2010, p. 155. Proclamation 1 of 1974; Proclamation 2 of 1974; Proclamation 110 of 1977 were the laws on the bases of which the Special Prosecutor contended that the accused were not Head of State.

⁹⁴ Article 3 of Proclamation 1 of 1974.

Government (and not of the Head of State) until the king-designate returned to the country and the coronation ceremony is held.⁹⁵ Later, in 1977, the law clearly stated that the power to direct, on behalf of the Council, the affairs of State as Head of State, was entrusted to Mengistu, the Chairman of the Council, and not to the congress nor to the members of the Council. The SPP urged the Court to rule that the accused persons' objection lacked merit, as they did not have immunity.

The SPP also argued that the accused had suspended the 1955 Constitution, which gave personal immunity to the king as Head of State. The SPP stated that the 1955 Constitution, on the basis of which the accused claimed immunity, was repealed by the law enacted by the accused themselves as *Derg* members.⁹⁶ The law enacted by the *Derg* members stated that

the constitution of 1955 was prepared to confer on the Emperor absolute powers; it doesn't safeguard democratic rights but merely serves as a democratic facade for the benefit of world public opinion; that it was not conceived to serve the interests of the Ethiopian people; that it was designed to give the baseless impression that fundamental natural rights are gifts from the Emperor to his people; and that, above all, it is inconsistent with the popular movement in progress under the motto "Ethiopia Tikdem" and with the fostering of economic, political & social development.⁹⁷

The law thus suspended the Constitution and called for enactment of a new constitution urgently.⁹⁸ The prosecutor rightly pointed out that it was paradoxical for the accused to claim immunity on the basis of the Constitution enacted by the government that they had toppled, and which Constitution the accused themselves later suspended.⁹⁹

The prosecutor reasoned in the alternative that, even if the defendants were a collective Head of State as they argued and the *Derg* had not repealed the Constitution; the immunity clause still could not have barred the prosecution.¹⁰⁰ According to the SPP, the immunity clause under the 1955 Constitution applied only in respect of the Emperor.¹⁰¹ As argued by the SPP,

the immunity of the Emperor is personal and a comparable immunity is not enjoyed by other members of the Imperial Family. The reasons which explain the immunity of the Sovereign, whichever they may be, cannot apply to justify its extension to the family of the

⁹⁵ Article 2 of Proclamation 2 of 1974.

⁹⁶ The SPP Reply to the Objections 1995, pp. 8–9; the SPP Dossier 2010, p. 154.

⁹⁷ Preamble, para 3, Proclamation 1 of 1974. See also the SPP Reply to the Objections 1995, pp. 8–9.

⁹⁸ The law which deposed the Emperor stated that: '(a) The Constitution of 1955 is hereby suspended; and (b) The new draft constitution, the promulgation of which [had] been demanded by the Armed Forces Council as a matter of urgency, shall be put into effect after necessary improvements are made to include provisions reflecting the social, economic and political philosophy of the new Ethiopia and to safeguard the human rights of the people.' Article 5 Proclamation 1 of 1974.

⁹⁹ The SPP Reply to the Objections 1995, p. 9.

¹⁰⁰ The SPP Reply to the Objections 1995, p. 7.

¹⁰¹ The SPP Dossier 2010, pp. 153–154; the SPP Reply to the Objections 1995, p. 7.

Sovereign and, as a matter of fact, Ethiopian tradition goes against this extension. The Fetha Negest declared that the Emperor shall try all persons equally and with impartiality, whether they are “his son, his parents or his friends” and Ethiopian history supplies the example of Emperor Zara Yacob who sentenced to death under the ordinary law his son who had murdered a slave. It is therefore, on historical as well as juridical grounds that the Ethiopian Constitution (of 1955) provides for the immunity of the Emperor, and of the Emperor alone.¹⁰²

The SPP further argued that the equality provision of the Penal Code would not have permitted the non-prosecution of the accused even if they were a collective Head of State as claimed by their counsels—they were not absolved from criminal prosecutions based on the Penal Code.¹⁰³ To buttress its argument the SPP stated that the Penal Code was equally applicable to everyone regardless of their status. It reasoned as follows:

Criminal law applies to all alike without discrimination as regards persons, social conditions, race or religion. No difference in treatment of offenders may be made except as provided by this code which are derived from immunities sanctioned by public international and constitutional law, or relate to the gravity of the offence or the degree of guilt, the age, circumstances or special personal characteristics of the offender, and the social danger which he represents.¹⁰⁴

In light of this, the SPP argued that even if the accused were formerly a collective Head of State, that would not have inhibited prosecution under the Ethiopian laws, and that *Derg* officials were subject to condemnation and criminal prosecution for what they did. Likewise, the SPP argued that under international law and practices, heads of state were made accountable for what they had done. In this regard, the SPP made reference to several international treaties, such as, Article 227 of the Versailles Treaty, Article 7 of the Nuremberg Charter, Article 4 of the Genocide Convention, Article 3 of the Convention to Prevent Apartheid, Article 7 of the ICTY Statute, and Article 6 of the ICTR Statute.¹⁰⁵ The prosecutor also made reference to international practices and historical instances where former heads of state stood trial and were punished for their commission of crimes.¹⁰⁶ On the basis of those rebuttal replies, the SPP entreated the Court to dismiss the claims of immunity.

¹⁰² The SPP Reply to the Objections 1995, p. 7.

¹⁰³ The SPP Dossier 2010, p. 153.

¹⁰⁴ SPP Reply to the Objections 1995 p. 6; Penal Code Article 4, also the SPP stated similar provision of the UDHR, Article 7.

¹⁰⁵ The SPP Reply to the Objections 1995, pp. 3–7; the SPP Dossier 2010, pp. 147–152.

¹⁰⁶ The SPP stated that in France General Pite, Head of State of Vichy and his Prime Minister were charged, found guilty and penalized. In Greece after the fall of the ‘Colonels’ dictatorial regime’ in 1974, the President was penalized. On March 26, 1991, the former President Musa Triori and 32 officials of Mali were tried and found guilty of crimes. Similar trials of heads of state were carried out in Latin American countries (for instances, Argentina and Bolivia). The SPP also mentioned the decision of the Military Tribunals. See the SPP Dossier, 2010, pp. 157–58; the SPP Reply to the Objections 1995, pp. 13–14.

While the SPP's line of argument against the immunity objection deserves credit, it is submitted that it should have argued more cogently for the dismissal of the immunity claim of the accused. In its arguments against the preliminary objections of the defense lawyers, the SPP did not spell out the categories of immunity bluntly. The prosecutor should have argued clearly that the accused were not entitled to immunity because of their killing of members of the opposition groups. The arguments by the accused were that their acts of killing the opponents were part of their official duties—state acts. However, committing crimes should (and could) not be part of acts of state; therefore, the claim to immunity was unfounded.¹⁰⁷ Besides, since the accused were no longer in office, they did not have personal immunity as this kind of immunity ceased to subsist the moment they left office.¹⁰⁸ The accused therefore enjoyed neither functional nor personal immunity. This aside, since immunity from prosecution is not a substantive right but a privilege, it follows that a state can legally deny its nationals such privilege before its courts. In other words, the Ethiopian government, by exercising its legislative sovereignty, could waive the privilege without upsetting the notion of non-retroactivity and fundamental rights of individuals. However, the SPP did not raise this line of argument for debunking the immunity claim. Rather, as outlined above, the SPP embarked on seemingly oxymoronic arguments. First, the SPP argued that the accused were not a collective Head of State. This is a contradiction of the SPP's argument in the charge. This is because the SPP rightly alleged in the charge that the accused acted as a collective Head of State during the early years of the *Derg* rule. Secondly, the SPP in its argument, attempted to distinguish between the Head of State and Government. By implication, this would mean that the head of government, unlike the head of state, is not entitled to immunity, which is untenable. Thirdly, in its argument the SPP implied that had the accused been Head of State they would have been entitled to immunity for the crimes they perpetrated. The Court's ruling on this and other objections will be outlined below.

¹⁰⁷ For a summary of the inapplicability of *ratione materiae* for perpetrators of (serious) crimes, see Cassese 2012, pp. 853–855, Werle and Jessberger 2014, pp. 271–274.

¹⁰⁸ For a general discussion on immunity, see the International Court of Justice, *Democratic Republic of Congo v Belgium, Arrest Warrant* of 11 April 2000, Judgment, ICJ Reports 3 (2002) paras 21–22. The International Court of Justice, *Djibouti v France*, Certain Questions of Mutual Assistance in Criminal Matters, Judgment, ICJ Reports 2008; *R v BowStreet Magistrate* (ex parte Pinochet) 91999UKHL17, (2000) 1 AC147; International Law Commission, Preliminary report on immunity of State officials from foreign criminal jurisdiction, Special Rapporteur Roman Anatolevich Kolodkin, UNGAOR, 60th Sess, UN Doc A/CN.4/601 (29 May 2008); Akande 2004, pp. 407–433; Cassese 2013, pp. 318–322; Cassese 2012, pp. 853–875; Akande and Shah 2010, pp. 815–852; Van Alebeek 2008; Crook 2006; Werle and Jessberger 2014, pp. 270–277; Whomersley 1992 pp. 848–858; Tomonori 2001, pp. 261; Watts 1994-III, pp. 9–130; Jia 2012, pp. 1303–1321.

Objection Related to the Charges of Politicide

The defense lawyers for the accused submitted an objection that the charges of genocide had no legal basis, on the following grounds: First, the authoritative Amharic version of Article 281 of the Penal Code did not categorically list a political group as falling within what are classified as protected groups.¹⁰⁹ The Amharic version of the provision reads that

whosoever, with intent to destroy in whole or in part, a section of multinational society or group having common language and culture which is unified by race, religion, or political conviction ...¹¹⁰

It is true, that political groups *per se* were not mentioned under the Amharic version of the Code, nor was an ethnic group.¹¹¹ The English version, however, conspicuously listed political groups as one of the protected groups. In Ethiopia, both the English and Amharic versions are authentic, but whenever there is a conflict the latter version prevails.

As can be discerned from the above-quoted text of the Amharic version of the Code, what was clearly mentioned was a politically organized multinational section that is unified by political conviction. Was this meant to include a political group? According to the contention by the defense counsels, this reference did not include a political group.¹¹² They, therefore, argued that the legislature did not intend to extend protection to a political group; Secondly, the counsels argued that the Genocide Convention, which Ethiopia had ratified, did not include political groups.¹¹³ Since international treaties ratified by Ethiopia were superior in hierarchy to other laws on the basis of the 1955 Constitution, the extension of protection to a political group by the Penal Code was inconsistent with the Convention to which Ethiopian had acceded. Thus, the Penal Code was superseded by the Genocide Convention. The defense counsels argued, too, that their clients did not commit the alleged conducts against individuals because of their mere membership of political organizations as there had not been legally registered political parties. Instead, the conducts were carried out because of the personal criminal activities of the individuals. Put differently, the argument is that the victims were not targeted because of their membership of any political organization; rather, they were

¹⁰⁹ The SPP Dossier 2010, pp. 158–166. The *SPP v Mengistu et al* Preliminary Objection Presented by the Defense Counsels 1995, the SPP Reply to the Objections 1995, pp. 21–22; Aneme 2009, pp. 10–11.

¹¹⁰ Article 281 of the Penal Code (the Amharic version).

¹¹¹ The 2004 Criminal Code rectified the ambiguity in the Amharic version of the previous Penal Code and explicitly listed a political group among the protected groups. The relevant provision of the new Code reads as follows: ‘Whoever, in time of war or in time of peace, with intent to destroy, in whole or in part, a nation, nationality, ethnical, racial, national, colour, religious or political group, organizes, orders or engages in....’ Article 269 of the Criminal Code.

¹¹² The SPP Dossier 2010, p. 163; the SPP Reply to the Objections 1995, p. 21.

¹¹³ The SPP Dossier 2010, pp. 159–166.

‘punished’ for their criminal activities. Therefore, the acts could not have amounted to politicide. They further argued that, even if it could be assumed that political groups were protected against genocidal acts and victims were said to be targeted because of their membership of political groups, such protection did not apply to groups, which were not legally registered. On these grounds, the counsels requested the Court to dismiss the charges.¹¹⁴

The prosecutor responded to these objections by stating that political groups were protected from genocidal acts under the 1957 Penal Code.¹¹⁵ The original French draft of the Penal Code unequivocally indicated that the legislature extended protection to a political group. The SPP stated as follows:

The Ethiopian Penal Code of 1957 was first drafted in French and in that draft a political group was clearly included. This shows that there was a conviction to incorporate a political group under the Ethiopian penal code in relation to a crime of genocide. The English draft (i.e. Article 293) which was identical to the French version, is in line with such assertion.¹¹⁶

Based on this, the SPP argued that the original draft of the provision clearly included a political group. In other words, the SPP resorted to historical interpretation. Hence, the legislature had deliberately included political groups within the realm of groups protected against genocidal acts by using ‘a multinational political section’ in the final Amharic version of Article 281 of the Code.¹¹⁷ The SPP further reasoned that there was no difference between ‘political sections’ of a multinational society as referred to in the Amharic version and ‘political groups’ as used in the English version of the Code. As the SPP put it: ‘The only difference is that the latter expresses the idea more coherently to mean members of difference [*sic*] political sections (organizations) with common political beliefs.’¹¹⁸ Hence, the SPP concluded that political groups were recognized as one of the protected groups under the 1957 Penal Code of Ethiopia.

The SPP vigorously rejected the contention by defense counsels that the inclusion of political group under the Penal Code violated international law. The SPP argued that the Genocide Convention and several other international treaties provided the minimum threshold or protection with which states are enjoined to comply. Providing wider protection under national penal law is not only desirable but also the sovereign right of states. Thus, the inclusion of a political group under the Penal Code did not by any standard fly in the face of the Genocide Convention.

¹¹⁴ SPP Reply to the Objections 1995, pp. 21–22. For instance, the counsels for the 36th accused stated in his statement of objection against the charge that ‘members of the so-called political groups stated in the criminal charge such as E.P.R.P. [Ethiopian People Revolutionary Part] and E. D.U [Ethiopian Democratic Union] were executed simply for their individual and personal criminal activities. They were not executed for being members of one of these so-called political groups because there has not been any political group legally registered.’ The SPP Reply to the Objections 1995, p. 21.

¹¹⁵ The SPP Reply to the Objections 1995; the SPP Dossier 2010, p. 161.

¹¹⁶ The SPP Reply to the Objection 1995, p. 18.

¹¹⁷ The SPP Dossier 2010, pp. 161–162.

¹¹⁸ The SPP Reply to the Objections 1995, p. 21.

Rather, it is a laudable action that rectified the blind spot of the Genocide Convention. The SPP also dismissed the counsels' argument that the individuals mentioned as victims were targeted because of their criminal activities rather than membership of any registered political groups. The SPP stated that most of the victims that the accused had targeted were prison inmates who posed no threat and who were not actively taking part in any hostility. The SPP specifically noted as follows:

About ninety-seven per cent of the deceased mentioned in the SPP charge were illegally detained; they suffered bodily harm; they were weakened by hunger and disease; they were locked in prisons established by defendants; they were physically and mentally exhausted and, while on the verge of death, they were being watched by the defendants soldiers and finally executed.¹¹⁹

From the above, it is clear that they were targeted by the accused, not because of their criminal activities, but because of their membership of the specified political groups. The SPP further reasoned that even if the victims mentioned in the charges had participated in criminal activities that did not give the accused, leaders of the country, the right and licence to kill individuals without any semblance of justice. In relation to the counsels' argument based on non-registration of the political groups, the SPP argued, rightly so, that legal personality or registration is not necessary for the protection to be extended to the members of the targeted political groups. The SPP pointed out that for the protection of members of political groups against genocide, there was no need for the registration of the groups. In fact, the accused established the WPE as the only *de jure* and *de facto* party in the country. All other parties were banned as criminal organizations. The fact that political groups were not incorporated or registered in the country could not justify the annihilation by the *Derg* regime of those whom they regarded as members or sympathizers of 'criminal organizations'. Had this been the case, several religious, national, and ethnic groups would have been precluded from protection against genocide. The SPP noted that 'for no one may be executed neither for not having a kebele identification card nor for failure to produce a birth certificate from the municipality'; non-registration of political groups could not preclude their real or perceived members from legal protection against genocidal acts.¹²⁰

The SPP further stated that:

Truly speaking, one can't require the prosecution or the victims of the policy to prove whether there were political groups at all and whether it was political beliefs that united these people. It is enough on the part of the prosecution to produce killing-orders of defendants against these political groups. If, for example, a decision-giving defendant signed an order that a person alleged to be a member of E.P.R.P. be killed, this alone would be sufficient evidence. It must be clear that it is the author of the criminal act himself that creates the connection between the political group he wants to destroy wholly or partially and the deceased or the victims of the criminal act.¹²¹

¹¹⁹ The SPP Reply to the Objections 1995, p. 22.

¹²⁰ The SPP Reply to the Objections 1995, p. 22.

¹²¹ The SPP Dossier 2010, p. 164; the SPP Reply to the Objections 1995, p. 22.

Accordingly, for the SPP the defining feature of genocide against a political group was neither registration of the targeted group nor the victims' membership of the group. Instead, the definition of the targeted group and its members thereof by the authors of politicide were the pertinent criteria that would make the acts politicide. In other words, with regard to how to determine the protected political group and members, by rejecting registration of the groups and their members, the SPP rightly espoused a subjective approach. The SPP stated that by labelling certain political groups as counter-revolutionaries and reactionaries, the accused had annihilated or authorized the annihilation of the real or perceived members of those groups. Hence, the SPP requested the Court to dismiss the counsels' arguments on the criminality of politicide.

Acts Authorized by Law

Counsels for the defense objected to the charges on the basis that the law authorized the acts of their clients and they did what they ought to have done. Counsels argued that the accused were in fact required to take measures to defend the peace and security of the country against the disruption caused by anti-revolutionaries, anti-people and reactionaries. The accused mentioned the laws on which basis they carried out the alleged acts, claiming that the acts were lawful on the basis of the then-operational laws.¹²² The law, they said, authorized them, in that 'in order to ward off anything that poses danger to the country's territorial integrity, and to ensure the unity of its national defence, the government will take all the necessary steps.'¹²³ The counsels stated further that the law authorized the leader of the *Derg* 'to see to it that peace and security of the broad masses are ensured as well as take measures against reactionaries and counter-revolutionaries.'¹²⁴ Based on those laws, the accused were authorized to take measures against the individuals mentioned in the SPP charges. This means, according to the counsels' argument, that the Penal Code on the basis of which the prosecution charged the accused was abrogated by the aforementioned laws.

The first law enacted by the *Derg* unequivocally stated that any law which contravened the law enacted by the *Derg* was invalid.¹²⁵ Hence, the defense

¹²² Proclamation 1 of 1974; Proclamation 2 of 1974; Special Penal Code 8 of 1974; Proclamation 10 of 1974; Proclamation 110 of 1977.

¹²³ Article 5 of Proclamation 2 of 1974.

¹²⁴ Article 8(9) of Proclamation 110 of 1977.

¹²⁵ The law read that: 'All existing laws that do not conflict with the provisions of this Proclamation and with all future laws, orders and regulations shall continue in force' Article 10, Proclamation 1 of 1974. Another law enacted by the *Derg* stated that the Penal Code of 1957 and other criminal laws 'shall supplement this Special Penal Code to the extent that they are consistent therewith.' Article 3(2) Special Penal Code 8 of 1974. A similar provision was retained in the Revised Penal Code, which replaced the latter in 1981. See Article 2 of the Revised Special Penal Code 214 of 1981.

counsels argued that the alleged acts of the accused were lawful acts pursuant to the laws then in effect. Thus they pleaded for the charges to be dismissed.

The SPP replied to this argument by stating that there was no law that authorized the accused to carry out arbitrary killings, torture and detentions against those they had labeled as reactionaries or opposition groups. The SPP noted that:

There exists no law which authorizes defendants to commit the crime of genocide, to kill without due process of law, to inflict bodily harm and to commit the crime of enforced disappearance. The proclamation which they allegedly enacted in their capacity as Head of State and which they consider to be superior to all laws doesn't give them such power either.¹²⁶

The SPP argued that the law enacted by the *Derg* did not give the accused the power to kill the victims arbitrarily. The SPP explained that no *Derg* law had repealed the Penal Code. In other words, the Code remained in force during the whole reign of the *Derg*.¹²⁷ Thus, the accused had no legal authority to commit acts criminalized and made punishable by the Code.¹²⁸ The SPP stated that

an objection based on the argument that the proclamations enacted by the P.M.A.C. or government were superior to all laws has been forwarded by defendants. The office of the Special Prosecutor understands this argument as a confession of defendants to the effect that they placed themselves above the law and brutally murdered those innocent persons listed in the charge.¹²⁹

The SPP further argued that even if *Derg* laws, as claimed by the defense counsels, authorized the acts, such *carte blanche* promulgation of law, which legitimized arbitrary and limitless killing, could not have exonerated the accused from liability. The SPP, interestingly, argued that '[s]ince the proclamations enacted by the P.M.A.C. emanated from a dictatorial regime, they not only implemented the will of this organ but they also violated the rule of law and the principles of contemporary criminal law.'¹³⁰

In other words, arguing that the killings and torturing of opponents 'were permitted by law which was superior to all laws but below them' is tantamount to saying, 'we could make our law superior to all other laws and, by the instrumentality thereof, we could kill civilians.'¹³¹ The SPP concluded its rebuttal by stating that '*orders signed while drinking tea and coffee have resulted in the arbitrary killing of tens and hundreds of innocent citizens; if the power to do so is said to have been given by a law, then that "law" can't be but a law of the jungle whose operation depended solely on the strength of the claws and teeth.*'¹³²

¹²⁶ The SPP Reply to the Objections 1995, p. 9.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid., pp. 9–10.

¹³⁰ Ibid.

¹³¹ Ibid., p. 9.

¹³² Ibid.

The Special Prosecutor accordingly requested the Court to overrule this objection against the charges.

The Charges Barred by the Statute of Limitations

The defense counsels contended that the statute of limitation barred the charges of inciting genocide, unlawful detention and arbitrary arrest.¹³³ They argued that the period within which those charges should have been filed was 10 years.¹³⁴ Since the ordinary period to bring charges for crimes punishable with life imprisonment or the death penalty is 25 years, the accused, understandably, did not raise this objection to the second charge—the period from the *Derg*'s ascendancy to power (1974), let alone from the time when the alleged crimes were committed, to the time of institution of the charge by the SPP (late 1994) was barely two decades. Even in the case where the ordinary period to bring charges prescribed by the Penal Code was to be applied for genocide charges, the second charge could not have been barred by limitations. The objection based on prescription was raised only to the other three charges.

¹³³ *Ibid.*, p. 24. Under the Penal Code, if charges were not instituted within the period prescribed in the law, any criminal action would be barred. With regard to charges brought after expiry of the ordinary period set by the law, the courts are obliged to dismiss the charges even in case the accused failed to invoke the statute of limitations as an objection to the charges laid against him/her. This is so because as the law quite bluntly put it, 'limitation extinguishes the liability to punishment in respect to any of the participants. As soon as the limitation has elapsed neither a conviction nor penalties or measures may be pronounced.' See Article 225 of the Penal Code and Articles 130 and 131 of Criminal Procedure Code.

¹³⁴ Article 226 of the Penal Code, based on the sentences prescribed for the crimes, provided for ordinary period of limitations within which the criminal action should be instituted. Accordingly, the limitations period for a criminal action shall be:

- a. twenty five years for offences punishable with death or rigorous imprisonment for life;
- b. twenty years for offences punishable with rigorous imprisonment exceeding ten years but not exceeding twenty five years;
- c. fifteen years for offences punishable with rigours imprisonment exceeding five years but not exceeding ten years;
- d. ten years for offences punishable with rigorous imprisonment punishable with not exceeding five years;
- e. five years for offences punishable with simple imprisonment exceeding one year;
- f. three years for offences punishable with simple imprisonment not exceeding one year, or only with fine.

The first charge (incitement to genocide) and the third charge (unlawful detention) were each punishable with rigorous imprisonment not exceeding five years. If this ordinary period was to be applied as claimed by the defence counsels, the charge should have been brought within ten years from the time of commission of the alleged acts. The fourth charge (abuse of power) was punishable with simple imprisonment, which means that the period of limitations within which to bring the charge was much less than for the other two.

The defense lawyers also presented an objection that the proclamation that established the SPP should not retroactively deny the accused the right to raise the statute of limitations as a bar to the charges.¹³⁵ The law stated that

the provision concerning the limitations of criminal actions and the time limit for submission of criminal charges, evidence and pleading to charges shall not be applicable to proceedings instituted by the Office [SPP].¹³⁶

The counsels argued that this provision should not be interpreted as a limitation on the right of accused to invoke the period of limitation as a preliminary objection to the charges, for to do so would amount to an *ex post facto* application of law to the detriment of the accused.

In its rebuttal, the SPP rejected the above argument of the accused on the following grounds:¹³⁷ First, the SPP outlined that the Proclamation, which established the SPP and the newly adopted 1995 Constitution clearly stated that the periods of limitation were (and are) inapplicable to genocide and to charges instituted by the SPP in general.¹³⁸ The Office stated that a statute of limitation is not a fundamental human right of accused persons but a procedural right that could be modified, or qualified or subjected to limitation without hampering the rendition of justice. The SPP specifically noted as follows:

The point of departure, without any doubt, is that the statute of limitations is not an essential human right, and it isn't a right of the accused person or the convicted; it is not an imperative of justice, as consecrated in the institutions of civilized people; on the contrary, it is a practice of expedience, admitted in recent periods, a rule that is rejected by important legal systems, and discussed or criticized by those which admitted it.¹³⁹

Thus, the limitation set by the Proclamation that established the SPP was justifiable. The SPP also mentioned international instruments which plainly stated the inapplicability of a period of limitation to crimes against humanity and war crimes.¹⁴⁰ However, the relevance of this instrument, let alone for charges of politicide, but for unlawful detention and abuse of power was not clearly outlined. No matter how unconvincing it might be, the inapplicability of the statute of limitations to crimes against humanity could be arguably extended to politicide. Even if the acts perpetrated by the *Derg* regime were characterized and charged as genocide due to a lack of legal framework on crimes against humanity *per se* under Ethiopian law, with respect to the charges, the acts could also be regarded as crimes

¹³⁵ The SPP Reply to the Objections 1995; Aneme 2009, p. 8.

¹³⁶ Article 7(2) of Proclamation 22 of 1992.

¹³⁷ The SPP Reply to the Objections 1995, pp. 24–27; Aneme 2009, p. 15.

¹³⁸ Article 7(2) of Proclamation 22 of 1992, Article 28 of the FDRE Constitution of 1995.

¹³⁹ Graven 1965; the SPP Reply to the Objections 1995, p. 25.

¹⁴⁰ UN 1968. The Office quoted Article I which reads as follows: 'No statutory limitation shall apply to the following crimes irrespective of the date of their commission. /b/ ..and the crime of genocide as defined in the 1948 convention on the prevention and punishment of the crime of genocide even if such acts don't constitute a violation of the domestic law of the country in which they were committed.'

against humanity. The above-mentioned stipulation under the UNGA Resolution therefore *mutatis mutandis* applies to politicide.

Secondly, the SPP argued that since the accused were charged for crimes they had committed from the genesis of the *Derg* to its downfall, the charges were not barred on the basis of the applicable ordinary limitations that the accused claimed. The reason is that the law stated that, for criminal acts that were committed over a period of time, the period starts to run from the day the last act was committed. The pertinent provision read as follows:

The limitation period shall begin to run from the day on which the offender first exercised his criminal activity. If such activity was exercised on several separate occasions the period shall begin to run from the day on which the last act was performed; if it was pursued over a period of time the period shall begin to run from the day on which it ceased.¹⁴¹

Based on this, the charges of provocation to commit genocide, unlawful detention and abuse of power would only be barred 10 years from the day of commission of the last act of the respective crimes. Thus, the SPP reasoned that even based on the existing laws, the charges were not barred by limitations.

Thirdly, the prosecutor stated that due to the investigation of the alleged crimes by the SPP, the periods of limitation were interrupted.¹⁴² This meant they had started to run afresh.

Fourthly, the SPP argued that even in cases where the ordinary periods of limitation were to be applied, since the victims or their relatives were not in a position to lodge complaints against the perpetrators during the Mengistu regime, the periods of limitation were suspended.¹⁴³ The provision stated that

limitation shall be temporarily suspended as long as there subsists, in law or in fact a bar other than one due to the volition of the offender to the institution or continuation of the prosecution. Upon removal of the bar, the period of limitation shall revive and continue its course.¹⁴⁴

Since it was not possible for the victims to take their cases to courts, and the courts, similarly, were not at liberty to entertain such cases, the period of limitation had been suspended.¹⁴⁵

Fifthly, the SPP further convincingly argued that

in those dark days when the saving of one's life at any cost was the challenge of life than lodging complaints, when butchers/killers/designated as "comrades" were awarded medals

¹⁴¹ Article 228(2) of the Penal Code.

¹⁴² The SPP Reply to the Objections 1995, p. 25. The law stated unequivocally that 'the limitation period shall be interrupted by any order, act, or decision for the purposes of summons, search, prosecution or investigation in relation to the offence or the offender. Upon each interruption, the whole period of limitation shall begin to run afresh. The interrupting act shall be absolute as to its effect; its effectual towards all the participants in the offence, whether known or unknown.' Article 230 of the Penal Code.

¹⁴³ The SPP Reply to the Objections 1995, p. 26.

¹⁴⁴ Article 229 of the Penal Code; the SPP Reply to the Objections 1995, p. 26.

¹⁴⁵ The SPP Reply to the Objections 1995, p. 26.

for their engagement in summary execution, when it was easy to live blaming God than accusing today's defendants, to bar the case by limitation will be tantamount to justifying those acts as right.¹⁴⁶

Hence, the ordinary period that the counsels claimed was suspended until the fall of the *Derg* regime that was only when the charges against the accused could be laid against them. In those cases when and where the period was interrupted, the laws stated that the absolute period of limitation is double the ordinary periods of limitation.¹⁴⁷ Ordinary periods of limitation for the above charges were 10 years, thus the absolute period of limitation, after which all charges would be barred, was 20 years. The prosecutor, therefore, concluded that even if the statute of limitations was to be applied to the charges, they were not barred by the statute of limitations since the absolute period had not elapsed. The SPP accordingly requested the Court to accept the charges by dismissing the unfounded objections of the accused.

Objection to the Framing and Organization of the Charges

In relation to the charges, the defense lawyers had several contentions that: First, the charges lacked clarity as to the description of the offences and their attendant circumstances.¹⁴⁸ They argued that the charges did not convey the specific crimes with which the accused were charged. They contended that the SPP had stated in the charge both genocide and crimes against humanity, so it was not clear to which crimes the charges were specifically referred.¹⁴⁹ Besides, the defense counsels averred that the charges failed to show how each accused was involved or connected to the commission of the alleged acts.¹⁵⁰ Secondly, the counsels argued, in relation to the organization of the charges, that the accused should not have been charged concurrently for inciting and committing genocide.¹⁵¹ In other words, the argument was that Articles 281 and 286 of the Penal Code could not be cited together. Thirdly, the counsels also objected to the concurrent use of Article 31(1) (a) and (b) of the Code.¹⁵² Their contention was that citing these two sub-provisions which deal with different modes of participation was erroneous. The reason given was that Article 32(1)(a) was a provision that dealt with direct and indirect

¹⁴⁶ The SPP Reply to the Objections 1995, p. 26.

¹⁴⁷ Article 231 of the Penal Code. The Code stated that: 'Whatever the circumstances may be the prosecution and the criminal action shall be barred in all cases when a period equal to double the ordinary period of limitation provided by law (Article 226) has elapsed or, in cases where a special period applies (Article 227), when such a period has been exceeded by half.'

¹⁴⁸ The *SPP v Mengistu et al* Preliminary Objection Presented by the Defense Counsels 1995; the SPP Reply to the Objections, 1995 p. 28.

¹⁴⁹ The SPP Reply to the Objections 1995, p. 29.

¹⁵⁰ Aneme 2009, p. 13.

¹⁵¹ Ibid.

¹⁵² The SPP Reply to the Objections 1995, p. 29; Aneme 2009, pp. 13–14.

preparation whereas sub-paragraph (b) of the same provision dealt with cases where the perpetrators fully associated themselves with the commission of the crimes without directly committing the alleged crimes.¹⁵³ Fourthly, the counsels submitted that citing Article 37 in conjunction with Articles 281 and 32 was inappropriate since conspiracy to commit genocide was not criminalized under the Penal Code.¹⁵⁴ Even if it was a crime since the accused did not establish the *Derg* regime to commit genocide, citing conspiracy to commit genocide was wrong. Fifthly, the defense contended that charging the accused with aggravated homicide in the alternative was not tenable.¹⁵⁵ The reason advanced was that aggravated homicide could not have been charged as an alternative to serious crimes, such as genocide. Based on the objections enumerated above that related to the framing and organization of the charges, the defense requested the Court to dismiss the charges.

The SPP submitted its rebuttals to the objections raised in relation to the organization of the charges that it had laid against the most responsible accused. Its rebuttal to the first objection was that the charges were fairly descriptive of the identity of the victims and accused, as well as the elements of the alleged crimes, and the times and places of the commission of the alleged crimes.¹⁵⁶ The charges were accordingly formulated not only in harmony with the forms set out by the law, but they also had included all the necessary details required under the criminal procedural law.¹⁵⁷ The SPP stated that since ‘the purpose of a charge is to enable the accused to know exactly what charge he has to answer, and not to provide him with every piece of evidence that will be produced in the course of the hearing.’¹⁵⁸

On the objection that the charges lacked specificity with regard to the alleged crimes, the SPP replied that Article 281 of the Penal Code is an amalgamation of at least two types of criminal offenses, namely, genocide and crimes against humanity.¹⁵⁹ However, ‘since genocide is the worst of the offenses that can be committed against humanity, our charge refers to genocide.’¹⁶⁰

Hence, the SPP pleaded that since the charges were correctly framed in the manner required by law, the objection should be dismissed by the Court.

With regard to the second objection that provocation and commission of genocide should not be concurrently charged, the SPP submitted its rebuttal by stating that incitement to commit genocide and committing genocide were two

¹⁵³ Aneme 2009, p. 13.

¹⁵⁴ The SPP Reply to the Objections 1995, p. 29; the *SPP v Mengistu et al* Preliminary Objection Presented by the Defense Counsels 1995; Aneme 2009, p. 13.

¹⁵⁵ Aneme 2009, p. 13; the SPP Reply to the Objections 1995, pp. 29–30; the *SPP v Mengistu et al* Preliminary Objection Presented by the Defense Counsels 1995.

¹⁵⁶ The SPP Reply to the Objections 1995, p. 28.

¹⁵⁷ *Ibid.*, Articles 111–112 of the Criminal Procedure Code of 1961.

¹⁵⁸ The SPP Reply to the Objections 1995, p. 28.

¹⁵⁹ *Ibid.*, p. 25.

¹⁶⁰ *Ibid.*, p. 22.

distinct crimes under the Penal Code.¹⁶¹ There was no reason why the accused could not be charged with both crimes. Consequently, the SPP rejected this objection as unfounded. The SPP also rebuffed the other objection by arguing that charging homicide as an alternative to the main charge of genocide was legally permissible.¹⁶² Since genocide and aggravated homicide protect a similar, if not identical, interest (or right), namely, right to life (or existence), charging the accused in the alternative with aggravated homicide was appropriate and recognized by the law.¹⁶³

The SPP maintained, furthermore, that the degree of participation of the accused in the commission of the alleged crimes varied, which therefore meant that citing Article 32(1)(a) in conjunction with Article 32(1)(b) was appropriate.¹⁶⁴ The SPP contended specifically that ‘some may have committed the act either directly as stated under Article 32(1)(a) and some indirectly as stated under Article 32(1)(b). This is something the prosecution will have to prove in the future.’¹⁶⁵ Consequently, the SPP pleaded for the rejection of the objection.

With regard to the objection regarding conspiracy to commit genocide, the SPP stated that conspiracy to commit genocide was not criminalized under the special parts of the Code.¹⁶⁶ However, Article 37 of the general part of the Code clearly

¹⁶¹ Ibid., p. 23. See also Aneme 2009, p. 13.

¹⁶² The SPP Reply to the Objections 1995, p. 23.

¹⁶³ Ibid., p. 23.

¹⁶⁴ Aneme 2009, p. 13.

¹⁶⁵ The SPP Reply to the Objections 1995, p. 24.

¹⁶⁶ The SPP stated that Article 281 of the Ethiopian Penal Code did not clearly designate conspiracy to commit genocide as a distinct crime, The SPP Reply to the Objections 1995, p. 24. Although this statement is correct, it was unnecessary because Article 286(b) of the Special Part of the Code criminalized conspiracy to commit core crimes. Secondly, the fact that Article 281 did not criminalize conspiracy to commit genocide as a distinct crime does not mean that conspiracy to commit genocide was not criminalized by other provision of the Code. As stated before, Article 286(b) of the Penal Code could have been used to show the criminality of conspiracy to commit genocide. It is true that under Article 37(1) of the Penal Code conspiracy to commit crimes was not recognized as an independent crime. As a matter of rule ‘conspiracy represents an intermediary stage between the internal phase preceding the commission of an offence and the beginning of execution of this offence.’ Graven 1965, p. 109. Thus mere collective agreement to commit crimes was not punishable. The collective agreement to commit a crime serves as aggravating circumstances only when the crime is attempted or committed. See also Article 37(2) provided exceptions by stating that where conspiracy to commit crimes was regarded as an independent crime, it is punishable as such. Thus mere collective agreement to commit crime was punishable, without a need for the aim to be attempted or committed, in those exceptional cases. One of the exceptions was conspiracy to commit genocide—Articles 37(2) and 286(b). If conspiracy to commit genocide was criminalized as an independent crime one would then pose why were the accused not charged with conspiracy to commit genocide? The SPP stated that Article 37 was mentioned in conjunction with Article 281 to show how the accused conspired to commit genocide. If so, why would the SPP not have charged them with conspiracy to commit politicide as it was criminalized under Article 286(b)? Is it because the acts which the accused had conspired to commit had already materialized or been carried out? From the SPP’s reasoning, it seems that conspiracy to commit genocide was not criminalized as a distinct crime. An evidentiary issue could not justify the

stated that conspiracy to commit crimes stated in the Special Part of the Code was a punishable crime.¹⁶⁷ The SPP argued that citing Article 37 in conjunction with Article 281 was appropriate to ‘show how the defendants conspired towards the commission of the crime of genocide.’¹⁶⁸ Thus the SPP requested the Court to overrule the objection.

No Punishment Without a Law

The defense lawyers objected to the charges on the grounds that they violated the *nullum crimen, nulla poena sine lege* principle, since there was no effective law that criminalized the alleged acts. In other words, they reasoned that the laws enacted by the *Derg* authorized the accused to carry out what the prosecutors alleged they had done. That very same law which authorized the accused to do so had repealed the Penal Code. Thus, according to the counsels, the charges levelled against the accused had no legal basis and deserved to be dismissed.

The SPP augured to this objection by stating that the accused were charged with violating Articles 281, 286, 522, 538, 416 and 414 of the Penal Code. The SPP

exclusion of conspiracy from the charges, because the SPP tried to show that the accused had conspired to commit genocide. Graven argued that ‘in so far as, the commission of an offence contrary to Article 281, [...], almost necessarily presupposes the commission of an offence contrary to Article 286, it is debatable as to whether both provisions apply concurrently.’ Graven 1965 p. 110. The author respectfully begs to disagree with Graven: Both under Ethiopian law and international instruments, the commission of genocide do not require conspiracy to commit genocide. In other words, collective agreement or preparation to commit genocide is not a necessary element for the commission of the crime of genocide. Of course, the presence of a collective agreement would make proof of special intent much easier. Thus, in the opinion of the author, conspiracy to commit genocide and commission of genocide are two distinct or independent offenses under Ethiopian law (Article 37(2)). In other cases where a collective agreement to commit a crime was recognized as an element of the crime or as an aggravating ground of the crime, conspiracy to commit could not be used as an independent offense when that same offence was attempted or committed. For genocide, conspiracy to commit was not encompassed as definitional element of the crime nor as an aggravating ground. Therefore, even when genocide is attempted or committed, conspiracy to commit same can be charged concurrently with commission of genocide. Thus, it is unclear why conspiracy to commit genocide was not included in the charges by the SPP. Maybe one could say it was included in the charge of preparation to commit genocide—Article 286(b). This is partly true but Article 286 criminalized both conspiracy to commit and preparation to commit genocide. Thus, both could have been used to charge the defendants. In some countries, when the crime that the conspirators agreed to commit had been committed or attempted, conspiracy does not apply. In other words, conspiracy covers only collective preparation to commit crimes. Nevertheless, in the Ethiopian case, it does not seem that conspiracy is limited to crimes that are not attempted nor committed. On conspiracy to commit international crimes, see generally Werle and Jessberger 2014, pp. 110–115; Okoth 2014.

¹⁶⁷ In support of its argument, the SPP also mentioned the Genocide Convention. It stated that: ‘Under the Convention for the Prevention and Punishment of the Crime of Genocide, we have shown that conspiracy to commit genocide is a crime whether committed by Heads of State or responsible government officials.’ The SPP Reply to the Objections 1995, p. 24.

¹⁶⁸ The SPP Reply to the Objections 1995, p. 24.

insisted that the said provisions and the Penal Code in general, remained extant during the entire period of the *Derg* reign. For this reason, the SPP asserted that the argument by the defence was not only unfounded but also misleading.

Dismissing the Case in Favor of Reconciliation

The defense claimed that the factors that led to the commission of the atrocities during the *Derg* reign were complex in nature and difficult to be configured in a criminal prosecution before Ethiopian courts. They applied for dismissal of the charges in favor of national reconciliation. In fact, the defense counsels entreated the Court to dismiss the charges in favor of adopting an approach similar to that of South Africa and some Latin American countries as a way of reckoning with their respective pasts.¹⁶⁹ The SPP argued vehemently against the objection, insisting that the objection did not fall within the ambit of preliminary objections recognized under the law, and that this argument consequently be overruled. The SPP further went on to aver that not to prosecute flew in the face of the rights of the victims. Apart from this, so the SPP affirmed, the Ethiopian government was obligated to prosecute the accused for having allegedly committed the crimes.

The Ruling of the Federal High Court on the Objections to the Charges

On 9 October 1995, the Court ruled on the lengthy motions to dismiss the charges that the counsels filed and which the SPP rebutted. The Federal High Court first overruled the argument by the defense that the Court lacked jurisdiction to try the case.¹⁷⁰ The Court ruled that it had unequivocal jurisdiction over the alleged crimes that the accused had committed. In short, the Court ruled that the crimes were included in the Penal Code to be primarily prosecuted by the Ethiopian courts, not by an international tribunal. Thus, the request to refer the case to an international tribunal was rightly dismissed. Based on the law, the Court had subject matter, personal and territorial jurisdiction over the alleged crimes. As to the issue of judicial independence, the Court ruled that the law that established the judiciary clearly stated that the courts are independent of any political interference. Hence, the objection related to the partiality of the Court was overruled.

The Court ruled in favor of the SPP with regard to the objection based on the statute of limitations.¹⁷¹ The Court declared that the charges against the accused were not barred by prescription because: First, the ordinary period of limitation was inapplicable to the crimes with which the accused were charged. In other words,

¹⁶⁹ The SPP Dossier 2010, pp. 167–168.

¹⁷⁰ The SPP Dossier 2010, p. 169; the *SPP v Mengistu et al*, First Criminal Division, FHC, Ruling, Criminal File 1/95.

¹⁷¹ The *SPP v Mengistu et al*, First Criminal Division, FHC, Ruling, Criminal File 1/95

based on the law, the crimes were imprescriptible. Secondly, even if the ordinary period was to be applied, the charges were not barred by limitations since the periods were interrupted and/or suspended.¹⁷²

The Court also dismissed the contention that the accused enjoyed immunity from prosecution, for the following reasons.¹⁷³ First, the Court stated that the provision of the 1955 Constitution, on the basis of which the accused claimed immunity, was expressly repealed by the law issued by the accused themselves. Therefore, immunity could not be legitimately claimed on the basis of the very same law they had repealed. Secondly, the laws enacted by the accused did not extend immunity to any *Derg* officials, including the Chairman. Thirdly, the Court then went on to pronounce, rightly, that, even if the provision of the Constitution was not repealed, the immunity under that Constitution was meant only for the Emperor and his royal families—the Court endorsed the SPP’s rebuttal argument. Fourthly, the Court also pointed out that there was authority in both international law and practice which supported the prosecution of former heads of state implicated in perpetrating the crime of genocide. Accordingly, on the basis of the grounds enunciated above, the Court, correctly decided that *Derg* officials did not enjoy immunity from prosecution for genocide and other crimes.

In fact, the SPP and the Court could have put forth a more cogent argument to dismiss the claim of immunity raised by the defense counsels. Such argument could have been based on the distinction that needs to be drawn between the two categories of immunity. The accused were no longer in office, thus they could not claim immunity *ratione personae* (personal immunity). With regard to the other category of immunity, the commission of crimes especially crimes as serious as the perpetration of genocide, could not be regarded or claimed as legitimate official functions for which officials assumed office. Thus, as the commission of crimes was and still is not a sovereign act of state, the *Derg* officials did not have functional immunity both under Ethiopian and international laws. Even if immunity were recognized under the law, that could not have exonerated former *Derg* officials, namely the accused in this case, from criminal liability. Personal immunity applies only to incumbent officials. After vacating office, the only category of immunity that the accused could claim was functional immunity. However, this immunity applies only to official functions, and not to the perpetration of crimes. Therefore, the *Derg* officials could not successfully claim either of the two categories of immunity from prosecution for the charges laid against them.

The Court also dismissed the counsels’ objection that the law authorized the conduct of the accused.¹⁷⁴ It said that the defense lawyers should not have raised it as it did not fall within the objections recognized by the law; instead, this is a sort of justification that could have been raised during the trial. The Court further declared

¹⁷² Ibid.

¹⁷³ Ibid. See also Aneme 2009, p. 15.

¹⁷⁴ The *SPP v Mengistu et al*, First Criminal Division, FHC, Ruling, Criminal File 1/95. See also Aneme 2009, p. 16; Yeshanew 1995.

that there was no law which authorized the accused to carry out genocide and other crimes against political opponents. The Court's ground for overruling this objection was less convincing, and other arguments could have been marshalled to dismiss more convincingly the objection based on acts authorized by law. As pointed out by the accused in their objection, the Red Terror and other human rights violations of the Mengistu regime, were authorized by law. It is hardly convincing to reject this objection by merely stating that there was no law which authorized the accused to do what they did. The Court could have tested the validity of such laws. In other words, it could have resorted to the Gustav Radbruch¹⁷⁵ formula to challenge the effectiveness of the 'unjust' or 'false' law enacted by the *Mengistu* regime. Leaders could not successfully claim the authority to enact law *carte blanche*; thus the legality of the law should be questioned. Accordingly, the Court could have driven home the point by asserting that dictatorial leaders who used the law as an

¹⁷⁵ This is a theory developed in the aftermath of WW II by the famous German legal theorist, Gustav Radbruch (1878–1949). He argued convincingly that a highly unjust rule loses its status as a valid legal norm. On legal validity, he wrote that '[p]ositivism is, moreover, in and of itself wholly incapable of establishing the validity of statutes. It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the "must" of compulsion, it never serves as a basis for the "ought" of obligation or for legal validity.' He suggested two parameters that would help to explicate the validity of law, namely: '(a) the positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law," must yield to justice; and (b) where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice.' See Paulson and Paulson 2006, pp. 6–7 (a translation of Radbruch's original work). The enactment does not in and of itself give the law the dignity of law. Hence, the accused could not successfully raise that piece of legislation as an objection or foolproof defense. In determining the criminal acts of the former East German border guards, the Federal Supreme Court of Germany made recourse to the Radbruch Formula. See Werle and Burghardt 2011, pp. 208–209. For more discussions on this and the general notion of the Radbruch Formula, see Kirchheimer 1995, pp. 350–374; Werle 1995, pp. 70–83; Geiger 1998, pp. 540–549; Herdegen 1995, pp. 591–606; Frank 2005, pp. 162–178; Paulson and Paulson 2006, pp. 13–15; Paulson 2006, pp. 17–40; Bix 2011, pp. 45–57; Paulson 1995, pp. 489–500; Bix 2006, pp. 139–149; Ambos 2013, pp. 293–315. Kirchheimer's eloquent argument on validity of laws is worth quoting at length 'not every piece of legislation enacted by a government in conformity with its own rules acquires, by the mere fact of enactment, the quality of binding the lower echelons. If its shows on its face the character of inhumanity, as did the decree concerning the administration of penal justice against Poles and Jews in the incorporated Eastern territories, then reference to its valid enactment cannot be invoked as defense by those who applied it. In those patently exceptional cases the value of legal certainty is not strong enough against the principle that intentional violation of minimum standards deprives an enactment of the claim to legal validity. Setting up machinery for the wanton destruction of human beings "selected on the basis of national or racial characteristics in the form of a general command rather than by specific order does not give such enactments the dignity of law. It is the negation of the purpose of law, which even in form of the shoddiest enactment must still offer a password: the ordering of human relations.' Kirchheimer 1995, p. 365.

instrument of repression could not justify the commission of the crimes based on 'unjust laws'.

The Court dismissed all other objections raised by the accused by endorsing the SPP's arguments, except for one. With regard to the counsels' objection on the framing and organization of the charges, the Court ruled that the citing together of Article 32(1)(a) and (b), which dealt with direct commission and indirect perpetration, respectively, together was inappropriate. Further, the Court ruled that Article 32, on commission, and Article 37, on conspiracy, should not have been mentioned concurrently. With regard to the last two charges as well, the Court heeded the counsels' objection and stated that the charges pertaining to these legislative provisions were not clear enough. However, the defects in the framing and organization of the charges did not warrant a dismissal of the charges. Rather, the Court ordered the SPP to amend them. Accordingly, the charges were amended and submitted on 28 November 1995 and later on 11 December 2001.¹⁷⁶

5.3.3 *The Main Trial: Tendering Evidence and the Ruling of the Federal High Court*

After the Court's dismissal of the objections, all the accused denied the charges laid against them and entered pleas of not guilty.¹⁷⁷ In accordance with the law, the Court ordered the SPP to tender its evidence to prove that the accused had committed the alleged crimes. The pertinent provision regulating the procedure states as follows:

After the plea of the accused has been entered, the public prosecutor shall open his case explaining shortly the charges he proposes to prove and the nature of the evidence he will lead. He shall do so in an impartial and objective manner.¹⁷⁸

The SPP produced a sizeable tranche of documentary evidence, such as, execution orders, minutes of the *Derg* meetings in which they decided to summarily execute Haile Selassie's officials and others, reports of summary executions, and

¹⁷⁶ *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/1995, (2003), pp. 3 and 6.

¹⁷⁷ On the plea of the accused, the Code stated as follows: '(1) After the charge has been read out and explained to the accused, the presiding judge shall ask the accused whether he pleads guilty or not guilty. (2) Where there is more than one charge the presiding judge shall read out and explain each charge one by one and shall record the plea of the accused in respect of each charge separately. (3) The plea of the accused shall be recorded as nearly as possible in the words of the accused.' Article 132 of the Criminal Procedure Code. Silence of the accused is tantamount to entering a plea of not guilty. The Article read that '[w]here the accused says nothing in answer to the charge or denies the charge, a plea of not guilty shall be entered. (2) Where the accused admits the charge with reservations, the court shall enter a plea of not guilty' Article 133(2) of the Criminal Procedure Code. In the Red Terror trial, the accused denied the charges explicitly.

¹⁷⁸ Article 136(1) of the Criminal Procedure Code of 1961.

many other documents of the accused persons' own making that survived the Mengistu dictatorship. The SPP had interviewed witnesses and drawn up a list of more than 2,000 witnesses who would be called to testify. However, only 725 were called to testify at the trial. The witnesses included the members of the sub-*Derg* who were present as observers but did not vote at the *Derg* meeting of November 1974 which decided that Haile Selassie's officials be executed.¹⁷⁹ Amongst the witnesses called to testify were also those who drove the individuals to the shooting field,¹⁸⁰ those who witnessed the executions,¹⁸¹ those who dug the mass graves and buried the victims *en masse*,¹⁸² and Mengistu's guard.¹⁸³ The wife of the celebrated Ethiopian author, Bealu Girma, testified about the disappearance of her husband.¹⁸⁴ The hearing of prosecution witnesses, the examination, and cross-examination consumed much time.¹⁸⁵ This is one reason for the protracted nature of the trial.¹⁸⁶ After the Court had evaluated and weighed the evidence adduced by the SPP, it handed down its ruling on 21 January 2003.¹⁸⁷

As regards the first charge, the Court ruled that the prosecution had proven its case beyond a reasonable doubt that all the accused, on many occasions had publically incited the commission of genocide against what they had labeled as anti-revolutionary groups. The Court accordingly decided that the accused should enter their defense.¹⁸⁸ As to the second charge, the Court ruled that the SPP had proven that all the accused had committed the first 16 counts, which related to the

¹⁷⁹ The third prosecution witness, Semratu Bajeba, the *SPP v Mengistu et al*, Ruling, First Criminal Division of the Federal High Court, 21 January 2003, pp. 13–21.

¹⁸⁰ The seventh witness, Destaye Teku, the *SPP v Mengistu et al*, Ruling, First Criminal Division of the Federal High Court, 21 January 2003, pp. 23–24.

¹⁸¹ The fifth prosecution witness, Aserat Degefe, the *SPP v Mengistu et al*, Ruling, First Criminal Division of the Federal High Court, 21 January 2003, p. 22.

¹⁸² The sixth prosecution witness, Desta Mekonen, the *SPP v Mengistu et al* Ruling, First Criminal Division of the Federal High Court, 21 January 2003, pp. 22–23.

¹⁸³ The 482nd prosecution witness testified about the execution of Teferi Benti, the *SPP v Mengistu et al* Ruling, First Criminal Division of the Federal High Court, 21 January 2003.

¹⁸⁴ The 183rd prosecution witness, the *SPP v Mengistu et al* Ruling, First Criminal Division of the Federal High Court, 21 January 2003.

¹⁸⁵ For the rules on examination of witnesses, see Articles 133 through 140 of the Criminal Procedure Code of 1961.

¹⁸⁶ On the reasons for the protracted nature of the proceedings, see *infra* Sect. 6.2.4.

¹⁸⁷ The *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/1995, (2003), p. 7. The law stated that: 'When the case for the prosecution is concluded, the court, if it finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, shall record an order of acquittal.' Article 141 of the Criminal Procedure Code.

¹⁸⁸ The *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/1994, (2003), pp. 7 and 15. The Article states that '[w]here the court finds that a case against the accused has been made out and the witnesses for the injured party, if any, have been heard it shall call on the accused to enter upon his defence and shall inform him that he may make a statement in answer to the charge and may call witnesses in his defence.' Article 142(1) of the Criminal Procedure Code. It is on the basis of this that the Court requested the accused to enter their defence. For the discussion on the first charge, see *supra* Sect. 5.3.2.1.

killing of 237 people.¹⁸⁹ The Court also ruled that evidence tendered by the SPP proved that the first 12 accused had committed most of the other counts contained in the second charge, from counts 18 to 209, which were the killings, the causing of serious bodily and mental injury, and the subjecting of opponents to destructive conditions.¹⁹⁰ However, the Court held that the SPP did not successfully prove some of the counts in the second charge. There were also some counts under the second charge that the SPP withdrew,¹⁹¹ or did not adduce evidence to prove them,¹⁹² or failed to prove them beyond a reasonable doubt.¹⁹³ In relation to all other 128 counts under the second charge, the Court ruled that the accused should enter their defenses.¹⁹⁴ With regard to the last two independent charges of unlawful arrest and confiscation of properties, the Court decided that the accused should put to their defenses as well, since the SPP had proved the charges beyond a reasonable doubt.¹⁹⁵

¹⁸⁹ The *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 7–16. For the discussion on the counts, see *supra* Sect. 5.3.2.1.

¹⁹⁰ For details on these counts, see *supra* Sect. 5.3.2.1.

¹⁹¹ Counts 71, 187, 188, and 201, see Federal High Court, *Mengistu et al*, Ruling, 21 Jan 2003, p. 581.

¹⁹² Counts 32, 97, 106, 107, 110, 112, 115, 118, 119, 121, 127, 135, 137, 138, 140–45, 178, 179, 181, 182, 193, 203, 204, 206, and 208, see Federal High Court, *Mengistu et al*, Ruling, 21 Jan 2003, p. 581.

¹⁹³ The counts that were discontinued due to insufficient evidences were: 17, 24, 35, 36, 41, 50, 51, 73, 76, 78, 79, 85, 92, 98, 99, 103, 104, 109, 111, 113, 114, 116, 122–24, 128, 130, 134, 136, 150, 162, 176, 177, 183–85, 189–192, 194–198, 202, 205, 207, and 209, see Federal High Court, *Mengistu et al*, Ruling, 21 Jan 2003, p. 581.

¹⁹⁴ The accused required to enter their defences to those counts: 1–16, 18–23, 26–31, 33, 34, 37–40, 42–49, 52–70, 72, 74, 75, 77, 80–96, 100–102, 105, 108, 117, 120, 125, 126, 129, 131–133, 129, 146–149, 151–161, 163–175, 180, 186, 199, and 200, Federal High Court, *Mengistu et al*, Ruling, 21 Jan 2003, pp. 581–582. See also *SPP (appellant) v Mengistu (accused-respondents) et al*, FSC, Criminal File No. 30181(2008), pp. 60–61.

¹⁹⁵ *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 16–17, Part Two: Decision of the Federal High Court’ in the SPP’s Indictment against *Mengistu et al* and Federal High Court’s Decision’ Published by Federal Supreme Court (2007), pp. 10–11.

The accused presented their evidence individually and collectively, and they did so by adducing a batch of documentary evidence¹⁹⁶ and calling, collectively, 65 defense witnesses.¹⁹⁷ Some of the accused made statements before the Court.¹⁹⁸ Several of the accused also, individually, called witnesses and tendered documentary evidence to rebut the charges brought against them.¹⁹⁹ On many occasions, the accused testified as defense witnesses of their co-accused.²⁰⁰

¹⁹⁶ 22 accused, collectively, adduced documentary evidence that was divided into 12 parts, see *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), p. 81 and pp. 81–184.

¹⁹⁷ The *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 12–52. See also ‘Decision of the Federal High Court’ in the SPP’s Indictment against *Mengistu et al* and Federal High Court’s Decision’ (2007), pp. 10–11. The defense witnesses of the accused were few compared to those tendered by the SPP. Some of the notable defense witnesses, collectively, adduced by the accused were: Professor Yusef Hassen (2nd common defense witness), Professor Mesfine Woldemariam (3rd Common defense witness), Dr Haile Wolde-Michael (11th common defense witness), Dr. Teferra Wolde (accused no. 12 common defense witness), Dr Hayilu Areya (accused no. 16 common defense), Yehonnes Heruy (accused no. 26 common defense witness), Dr Lapiso Getahun Gidielebo (accused no. 40 common defense witness), Dr Kassahun Berhanu (accused no. 50 common defense witness), Ketsela Mulat (accused no. 52 common defense witness), Tilahun Teshome (accused no. 60 common defense witness), Getachew Abera (accused no. 61 common defense witness), and Abera Degefa (accused no. 65 common defense witness), see the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 17–81.

¹⁹⁸ Under Ethiopian law, the accused person can make a statement if he wishes to do so. In that case, ‘[t]he accused may not be cross-examined on his statement but the court may put questions to him for the purpose of clarifying any part of his statement.’ Article 142(3) of the Criminal Procedure Court of 1961. Accordingly, the second accused, Fikre Selassie-Wogaderes gave his statement in which he rejected the commission of genocide in Ethiopia, the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 118–126. Likewise, the third accused, Fisseha Desta stated in his defense statement that in Ethiopia genocide was not committed but rather it was a civil war, the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 137–144. The other accused persons who gave defence statements included accused nos., 5, 7, 10, 11, 15, 16, 17, 19, 20, 21, and 41 see the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 216–217, 220–228, 239–242, 252–253, 262–264, 279–282, 319–323, 324–325, 396–399.

¹⁹⁹ The accused who called defense witnesses, individually, and adduced documentary evidence, included accused nos. 2, 3, 5, 7, 10, 11, 15, 16, 17, 19, 20, 21, and 41 the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 126–137, 145–205, 228–229, 242–252, 253–262, 264–278, 283–319, 326–330, and 399–408. Accused number 3 and 16 called 35 and 32 defense witnesses, respectively. Melaku Tefera, accused number 20, did not individually call witnesses but submitted a written defense statement. On this and other accused persons who called witnesses, see the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 126–459.

²⁰⁰ For instance, Legesse Asfaw, accused no. 7, was a defence witness for accused nos. 2 and 3, the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), p. 130 and p. 157. The accused no. 5 called eight defence witnesses; all of them were his co-accused (nos. 2, 3, 10, 11, 15, 16, 29 and 43), pp. 216–220. Accused no. 7 also called defence witnesses, which included some of his co-accused. He also tendered documentary evidence, the *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 228–229.

The evidence adduced by the accused was mainly in respect of proving, *inter alia*, that the Mengistu regime did not plan or conspire to commit genocide; that the Mengistu regime was the legitimate government, which thus meant that its acts were lawful; that the acts of the members of the oppositions were criminal; and the fact that some of the victims mentioned in the charges, including the Emperor, were not killed, but died of natural causes.²⁰¹

5.3.4 Conclusion of the Prolix Trial: The Verdict

After analyzing the evidence adduced by the defense, the Court handed down its long overdue verdict on 12 December 2006. The judgment was by a majority decision, with Judge Nurru Said dissenting. The decision of the majority judges and the dissenting opinion are highlighted below.

5.3.4.1 The Decision of the Majority

The FHC First Criminal Division, by a majority vote of two to one, convicted all the accused except one.²⁰² Accused Number 41, Major Begashaw Gurmessa was acquitted.²⁰³ In the Court's view, Begashaw successfully defended himself against all the charges laid against him and created a shadow of doubt on the evidence adduced by the SPP. He was thus not found guilty on all the four charges. Thus the Red Terror trials, including the main trial, were not scenarios in which all the accused were convicted across the board, as charged. As shown below, some other accused were also not found guilty on some counts.

As regards the rest of the accused the verdict was as follows: (1) all the remaining accused were guilty as charged for preparation to commit and incite genocide against political groups in violation of Articles 32(1)(a) and 286(a) of the Penal Code; (2) all the remaining accused were convicted of the crime of genocide on the first 16 counts, except count six; (3) all the accused were found guilty of detaining persons unlawfully, in violation of Articles 32(1)(b) and 416; (4) all the accused were found guilty on the last charge of unlawful confiscation of property, in violation of Articles 32(1)(b) and 414(a); and (5) all, except 12, were convicted

²⁰¹ The *SPP v Mengistu et al*, Federal High Court Ruling, Criminal File No. 1/94, (2003), pp. 18–19. See also Part Two: Decision of the Federal High Court' in the SPO's Indictment against *Mengistu et al* and Federal High Court's Decision' Published by Federal Supreme Court (2007), pp. 10–11.

²⁰² In total 55 accused were convicted in the *Mengistu et al* case. Presiding, Judge Medine Kiros and Judge Selmon Emeru were the ones who handed down the conviction judgment by majority decision.

²⁰³ Decision of the Federal High Court on the SPP's Indictment against *Mengistu et al* and Federal High Court's Decision' Published by Federal Supreme Court (2007), p. 412 and pp. 460–461.

on one count of aggravated homicide,²⁰⁴ which was count six of the second charge. The Court decided that this count did not fall within the category of genocide because of a lack of the genocidal element. Thus the accused were convicted of aggravated homicide as alternatively charged by the SPP; and (6) the first 12 high-ranking accused, including Mengistu, were convicted on most of the counts contained in the second charges.

5.3.4.2 Judge Nuru Said's Dissenting Opinion

As mentioned above, the conviction judgment of the higher *Derg* officials was not made by a unanimous decision. Judge Nuru Said elaborated on his dissenting opinion in the 10-page long document.²⁰⁵ He did not disagree with the majority on the acquittal of accused number 41 and on the conviction of the other accused for the last two charges.

However, he dissented from the majority decision with regard to the first two charges, namely, incitement and commission of genocide against political groups. He concurred with the majority on the conviction of the accused of unlawful detention and abuse of power.²⁰⁶ Judge Nuru reasoned that the accused should not have been convicted of inciting and committing genocide against a political group. In his words:

It is to be recalled that the defendants presented preliminary objection arguing that their actions were authorized by law. The Court has rejected the preliminary objection ruling that the 1957 Penal Code has never been repealed during the *Derg*. However, the ruling of the Court did not consider if the specific provisions on which the charges are based were repealed. It is clear that the 1957 Penal Code has never been repealed in its totality until the 2004 Criminal Code replaced it. However, it is imperative to investigate if particular provisions of the 1957 Penal Code were repealed. If a specific provision under 1957 Penal Code is repealed, it does not cause the repeal of the whole Penal Code. Conversely, the fact that the whole Penal Code was not repealed does not mean that some provisions could not have been repealed. Therefore when the defendants claimed that their actions were authorised by law, it is imperative to examine if the laws cited by the defendants have repealed specific provisions of the 1957 Penal Code.²⁰⁷

He stated that parts of Article 281 of the Penal Code, on the basis of which the accused were convicted, had been repealed by the laws enacted by the *Derg*.²⁰⁸ The Judge explained his position by stating that the laws issued by the *Derg* authorized

²⁰⁴ The *Mengistu et al* case, 21 January (2006), FHC, pp. 742–744.

²⁰⁵ Federal High Court, the *Mengistu et al* case Judgment, Dissenting Opinion of Judge Nuru, (2006), pp. 745–754.

²⁰⁶ *Ibid.*, p. 754.

²⁰⁷ The *Mengistu et al* case, Judgment, FHC Dissenting Opinion of Judge Nuru, (2006), p. 747 (translation by Aneme 2009, p. 223).

²⁰⁸ Proclamation 1 of 1974, Proclamation 110 of 1977, Proclamation 129 of 1977. See the *Mengistu et al* case Judgment, FHC, Dissenting Opinion of Judge Nuru, (2006), pp. 746–748.

the Chairman and other institutions to destroy or take measures against reactionaries, anti-people and anti-revolutionary groups. By virtue of this legal authorization to take measures against political groups, the protection of political groups under Article 281 of the Penal Code was tacitly repealed, because any law that contradicted Derg laws were declared ineffective by the Mengistu regime.²⁰⁹ Hence, he argued that a part of Article 281 of the Code, specifically the one dealing with politicide, was repealed.²¹⁰ In his opinion, repealing such a provision in part was possible because providing protection for political groups from genocidal acts was not mandatory under international law. In other words, the repealing of the crime of politicide by Derg laws did not violate international law since the latter did not, and still does not, recognize political groups as one of the groups protected against genocide.

However, Judge Nuru pointed out that repealing other parts of Article 281 which criminalized genocide against the protected groups recognized under the Genocide Convention was not possible.²¹¹ In other words, repealing provisions which dealt with crimes under international laws or acts condemned by all nations could not have been done legitimately. Therefore, according to him, as far as the other protected groups (ethnic, racial, national and religious) are concerned, the Code was not repudiated, which meant that the repealing applied only to politicide. This means that, had Derg officials been convicted of genocide against ethnic, religious, national, and/or racial groups, Judge Nuru would have concurred with the majority's decision.²¹²

Likewise, Judge Nuru argued that the provisions of the Code which criminalized homicide and the causing of serious bodily injuries were not repealed either.²¹³ In the learned Judge's view, those acts were recognized by all nations since the Nuremberg Trial; hence, they could not be legalized by repudiating the penal law.²¹⁴ Since the accused were responsible for killing and torturing the victims

²⁰⁹ Article 10 of Proclamation 1 of 1974.

²¹⁰ What logically follows then is that preparation and incitement to commit politicide were also repealed. Since the main crime—commission of politicide was decriminalized it was not logical for the accessory acts to be considered as crimes. The *Mengistu et al* case Judgment, FHC, Dissenting Opinion of Judge Nuru, (2006), p. 750.

²¹¹ The *Mengistu et al* case Judgment, FHC, Dissenting Opinion of Judge Nuru, (2006), pp. 748–49.

²¹² It is also important to note that nowhere in his dissenting opinion did Judge Nuru Said gainsaid or disagreed with the commission of the acts alleged in the counts contained in the charges. In fact, he stated clearly that the commission of the alleged acts by the accused were proved beyond a reasonable doubt; see the *Mengistu et al* case Judgment, FHC, Dissenting Opinion of Judge Nuru, (2006), pp. 750–51.

²¹³ The *Mengistu et al* case Judgment, FHC, Dissenting Opinion of Judge Nuru, (2006), pp. 751–53.

²¹⁴ *Ibid.*, p. 751.

listed in the charges, they should have been convicted of aggravated homicide and causing injury, not of genocide against political groups.²¹⁵ The Judge fully agreed with the majority decision that the accused had committed the crimes with which they were charged. The perpetration of the acts by the accused was not the point of difference; the contention was on the legal characterization of the conducts.

The arguments of the dissenting Judge Nuru are not compellingly convincing. If a part of Article 281 was impliedly repealed, the same reason should have applied in respect of the provisions on aggravated homicide and the causing of injuries. The fact that part of that provision was repealed means that the acts of killing of, and the causing of bodily injuries to, members of political groups were legal. There is, therefore, no logic in the reasoning according to which those same killings could then amount to aggravated homicide. In fact, the argument of Judge Nuru is self-contradictory. If killing a member of a political group remained a crime (as aggravated homicide) despite the *Derg* laws, there is no reason why the same killing did not amount to politicide. Judge Nuru's dissent from the majority decision was not based on whether or not the acts had been committed, nor on whether or not the requirement of special intent for genocide was met. His point of departure was solely on the basis of the fact that part of the Penal Code was impliedly repealed by the laws which authorized *Derg* officials to take measures against opponents. Since the *Derg* laws did not expressly repeal any part of the Penal Code, arguing that it was only part of Article 281, not the provision on aggravated homicide, which was repealed, is not convincing. Furthermore, the fact that politicide was, and still is, not included under international instruments does not on its own justify the repealing of part of Article 281 of the Code. Had Judge Nuru argued in similar fashion for the alternatives charges as well, this would have made his argument more cogent and logical. In other words, although it might not be necessarily correct, the argument that the law authorized the acts alleged in the charges, thus making the accused not culpable for the crimes, including aggravated homicide, would have held more water than the dissenting Judge Nuru's line of argument. Otherwise, to argue on the one hand that killing, as a material element of politicide, was impliedly repealed, meaning legalized, and on the other hand to refer to the very same killing as constituting the crime of aggravated homicide, is plainly contradictory.²¹⁶

²¹⁵ Accordingly, Judge Nuru stated that the first 12 accused, including Mengistu, should have been convicted of aggravated homicide and the causing of serious bodily injury. Whereas the other accused except accused no. 41 as far as the first 16 counts contained in the second charge is concerned should have been convicted of the aggravated homicide. The *Mengistu et al* case Judgment, FHC, Dissenting Opinion of Judge Nuru, (2006), pp. 752–53.

²¹⁶ The point to ponder at this stage is: what if the *Derg* laws expressly repealed the Penal Code and thereby legalized the killings, torture and arbitrary arrest of political opponents? What would have been the argument of Judge Nuru? Do we accept *carte blanche* legislation of laws by dictatorial regimes or do we challenge the validity of such laws? Obviously, as reasoned in the East German *Border Guards case*, such laws, which legitimized repression, could not have inhibited the prosecution of *Derg* officials, at least theoretically. Such laws would have been considered as unjust or false laws, which had had no effect. See Berlin State Court Trial of Border Guards Docket No. 523, 2Js 48/90 (9/91), Kritz 1995, pp. 575–586.

5.3.5 *Stocktaking of the Judgment: Evaluation*

In principle, the conviction of the accused of incitement and commission of politicide was compellingly convincing. The author is, however, of the opinion that the Court should have convicted the accused of aggravated homicide, instead of for commission of politicide, on some counts contained in the second charge. This is not because part of Article 281 was repealed, for the submission being made here accepts that the majority decision was correct in holding that the Penal Code remained intact during the *Derg* reign.²¹⁷

In respect of some counts contained in the second charge, based on the evidence presented by the SPP, it is hardly possible to infer the special intent to destroy the stated groups. For instance, with regard to the first count in the second charge, that is, the killing of 59 officials of Haile-Selassie's regime, it is difficult to say that, at the time of the commission, the element of special intent to annihilate the officials of the old regime existed. It is respectfully submitted here that it is not whether or not the members of the monarchy could be considered to have been a political group; it suffices that the perpetrators defined the groups as 'opponents', which thus made them qualify as a political group. The members fall within the definition of individuals unified by political conviction. It is submitted that what was missing was the special intent. The accused voted to summarily execute the former Emperor's officials because of 'their crimes.' And what led to the decision to summarily execute the officials was panic and the desire of low-ranking officials to cling to power. It is obfuscatory to argue whether or not the accused's aim was to exterminate Haile Selassie's officials. It is submitted that this act of killing was rather a mass killing which should have been regarded by the Court as aggravated homicide. The same applies to the killing of the Emperor. The accused did not kill the Emperor together with his 59 officials; they spared him for a while. As regards the Emperor's killing as well, the special intent was not clearly proven. It was not clear from both the evidence and circumstances surrounding the killing of the Emperor whether there was an intent to decimate members of the monarchy. Similarly, the killing of some *Derg* members and the Patriarch should not have been regarded as politicide.²¹⁸ In such cases of doubt, the Court should have given the accused the benefit of the doubt and convicted them of the crime of aggravated homicide. Other than the moral condemnation that conviction for politicide can convey, it was inconsequential with respect to the penalty, whether the accused

²¹⁷ In the opinion of the author although the accused were authorized by the *Derg* laws to carry out some measures against members of the opposition, it is hardly possible to conceive that they were authorized to carry out the arbitrary killings, torture and detentions against those who would (not) have created (any) threat. Thus, even based on the *Derg* laws, it could be argued that the accused were never authorized to carry out arbitrary killings. However, even had the *Derg* law expressly authorized the accused to carry out those egregious violations that would not have exempted them from criminal liability.

²¹⁸ For a detailed analysis on this, see *infra* Sect. 6.5.

were convicted of aggravated homicide or politicide. In fact, under the Penal Code, aggravated homicide carried a severe penalty.²¹⁹

Nevertheless, this does not mean that most of the counts for which the Court convicted the accused for the crime of politicide did not fulfil the requirements of the elements of politicide as defined under the Penal Code. Some scholars have argued that the acts that were alleged in the trial to have been committed by the accused do not amount to genocide.²²⁰ As decided by the Court, the acts of the accused during the official period of the Red Terror fit squarely within the definition of the crime of politicide. It is true that under the Genocide Convention the acts of the accused would not have amounted to genocide. However, since Ethiopia's law rightly widened the range of the protected groups and included political groups, most of the acts of the accused amounted to politicide. However, as stated above, some acts of the accused should not have resulted in them being charged with, and convicted of, politicide.²²¹

5.3.6 Sentencing Decision

Under Ethiopian law, conviction and sentencing judgments can legally be handed down the same day.²²² However, in the *Mengistu et al* case the sentences were imposed a month after the date of conviction. In complex cases, like that of *Mengistu et al*, which involves a large number of co-accused who are charged with

²¹⁹ The punishment that the law provided for aggravated homicide was either life imprisonment or death, whereas genocide was punishable with rigorous imprisonment from five years to life, or in cases of exceptional gravity, with death. Cf. Articles 522 and 281 of the Penal Code. One could argue that crimes, such as genocide are usually if not always are grave and heinous. Other things *ceteris paribus* (having regard to mitigating and aggravating circumstances), a case where *genocidaires* receive lesser punishment than homiciders is unforeseeable. Because of its international character genocide is the crime of all ordinary crimes, if not a crime of international crimes.

²²⁰ *Infra* Sect. 6.2.5. See also Kissi 2006, pp. 97–120.

²²¹ In other countries, denying the commission of genocide after judicial confirmation of its commission is a crime. For instance, denial of the Holocaust is a crime in many countries. See Tomuschat 2009, pp. 523–526. Also, denial of the Rwandan genocide is a crime under Rwandan law. Similarly, denial of Armenian genocide is a crime in some countries, like France, whereas accepting it as genocide is a crime in Turkey. However, under Ethiopian law denial of the commission of genocide, even after judicial confirmation of the crime, was, and still is, not a crime. Therefore, arguing that *Derg* officials should not have been convicted for politicide is not a punishable crime. Criminalizing denial of the commission of genocide is, in the opinion of the author, limiting the space of academic freedom and freedom of expression. Logic should be allowed to prevail.

²²² Article 149(3–5) of the Criminal Procedure Code of 1961. Where the parties want to present evidence or arguments with regard to the punishment to be meted out, the court has to give them reasonable time to do so. In such instances, the conviction and sentence might not be handed down on the same day.

serious crimes, it is hardly possible to convict and sentence the accused on the same day without jeopardizing the principles governing a fair trial.

The maximum penalty provided for under the Penal Code for the serious crimes of which the accused were found guilty, is the death penalty. The existing law provided a scheme for the determination and imposition of punishment.²²³ The law also listed aggravating and mitigating factors.

Following the conviction judgment, the Court heard the arguments of both the SPP and the accused on the question of sentences.²²⁴ The SPP asked the Court to impose the heaviest penalty on most of the convicted persons. The SPP presented the following aggravating grounds for the penalties to be imposed on the convicted:²²⁵ First, the accused had conspired to annihilate political groups and had used several mechanisms to accomplish this goal. Secondly, the accused did not show any sense of sincere remorse. Thirdly, the crimes were committed in a coordinated and organized manner over a period of 17 years. Fourthly, the accused were convicted of the commission of multiple crimes in this particular case and in other Red Terror cases. Fifthly, the SPP submitted to the Court that 18 of the accused in the *Mengistu et al* case had already been convicted in other Red Terror cases and given sentences ranging from 12 years' harsh imprisonment to the death penalty. The SPP argued that all the above-mentioned grounds constituted aggravating circumstances under the Penal Code. The SPP accordingly requested the Court to take the factors into consideration and to impose the maximum penalties that the law prescribed for the crimes for which the accused had been convicted. The SPP entreated specifically that the Court impose the death penalty on 30 of the convicted persons, including Mengistu.²²⁶ As to the remaining 25 convicted persons, the SPP asked the Court to impose a punishment of rigorous life imprisonment.²²⁷

In their argument on the issue of sentence, the accused asked the Court to take into account certain circumstances as grounds in mitigation of sentence. These included the following:²²⁸ (a) the fact that they had shown remorse for what they had done and had asked the government in vain to arrange venues for them to

²²³ The Special Part of the Code, which dealt with the particular crimes, prescribed the range of punishment for each offence; see *supra* Sect. 3.6; and Articles 281, 282, 522, 414 and 416 of the Penal Code. The law also provided a guideline for calculation of sentence; see Articles 85–87 of the Penal Code. The aggravating and mitigating circumstance were also enshrined in Articles 79–84 of the Penal Code. For guidelines on how to assess the sentences to be imposed in case of aggravating and mitigating circumstances, see Articles 183–193 of the Penal Code.

²²⁴ Article 149 of the Criminal Procedure Code of 1961.

²²⁵ The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 758–761.

²²⁶ These were the first 12 accused, and accused nos. 15, 16, 17, 19, 18, 20, 21, 22, 25, 26, 30, 48, 49, 50, 51, 53, 57 60 and 72 who had also been found guilty in other Red Terror cases. The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 758–759.

²²⁷ These were accused nos. 28, 31, 32, 34, 35, 39, 40, 42, 43, 47, 52, 54, 55, 56, 58, 59, 60, 64, 65, 66, 67, 68, 70, 105 and 106. The *Mengistu et al* case, Sentencing Judgment, FHC (2007), p. 759.

²²⁸ The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 763–766.

apologize to the victims and their families; (b) they asked the Court to consider their ages (they were between 50 and 80 years old) and their deteriorating health conditions or ailments and other personal circumstances in general; (c) they pleaded that the undue delay before commencement of the trial should be taken into consideration when imposing sentences; (d) they stated also that they had served their country in different capacities before they came to power; (e) they also pleaded that most of the acts were committed as a result of provocation by the (un)armed opposition groups which also bore responsibilities for what had been happened; (f) they also asked the Court to consider the fact that they had no previous criminal records; and (g) they also stated that they had received a low level of education and had only a diminished sense of awareness at the time they committed the crimes.

5.3.6.1 Majority Decision

The Court had up until the sentencing stage applied the old Penal Code. However, when it came to sentencing, the Court employed the new Criminal Code without explaining why it had resorted to the new Code. Based on the *lex mitior* principle, which envisions that someone charged with a crime should benefit from the mildest provision of a new law, the Court's resorting to the new Criminal Code was justifiable and necessary.²²⁹ Nonetheless, the Court should have given reasons why it had chosen to make use of the new Code, and not the law in force at the time of the commission of the crimes, at the sentencing stage.²³⁰

²²⁹ There is no substantial difference inter se the old and new Codes. With regard to the penalties for the crimes of which the perpetrators were found guilty, the new Code is favourable to the convicted persons. For instance, under the old Code, genocide was punishable with rigorous imprisonment from *five years to life* (emphasis added); or in cases of exceptional gravity, with *death*; whereas under the new law it is punishable with *rigorous imprisonment from five to 25 years*; or in more serious cases with *life imprisonment or death*. As regards to aggravated homicide, both Codes stated that the crime is punishable with rigorous imprisonment for life, or death. Cf. Article 522 of the Penal Code and Article 539 of the Criminal Code. As enshrined under the new Code: 'Where the criminal is tried for an earlier crime after the coming into force of this Code, its provisions shall apply if they are more favourable to him than those in force at the time of the commission of the crime.' See Article 6 FDRE Criminal Code. Hence, the application of the sentencing provisions of the Criminal Code was to enable the convicted persons to reap the benefits introduced by the new Code. In other words, the application of the new Code did not fly in the face of the prohibition of *ex post facto* application of law.

²³⁰ Whenever the Court resorts to the new Criminal Code, it is required that 'the Court shall decide in each case whether, having regard to all the *relevant* provisions, the new law is in fact more favourable.' See Article 6 FDRE Criminal Code. This has not been done by the Federal High Court, nor by the Federal Supreme Court in the Red Terror cases. However, there is no doubt that the new Code is favourable to the convicted persons insofar punishment is concerned. The Penal Code provided for unconstitutional forms of punishments, such as flogging. It is perhaps because of this advantage that the accused have never raised an objection when the Court resorted to the new Criminal Code at the sentencing stage. It would have been different had the Court applied the new Code to the crimes as such.

Based on the new Code, the Court evaluated all the arguments in aggravation and mitigation of the sentences.²³¹ The Court confirmed that the law provided for the death penalty as the maximum penalty for the crimes of which the accused were found guilty. Under Ethiopian law, the following cumulative conditions must be met before a court may impose capital punishment: (a) the crime must be grave; (b) the convict person should be an exceptionally dangerous criminal; (c) The law should expressly prescribe the death penalty as a punishment for the crime; (d) the crime should be a completed crime; (e) the convicted person must have reached the age of 18 years or above at the time he or she committed the crime; and (f) There should be no extenuating circumstances.²³²

The Court decided, by a majority, that the first five mandatory conditions for imposing the death penalty were met. However, the last condition was not fulfilled. The Court elaborated on the personal circumstances of the convicted persons, such as, level of education and rank, and said that the context within which they had committed the crimes could be regarded as an extenuating circumstance.²³³ The Court reasoned that the *Derg* was established by low-ranking soldiers with no or little education and experience. Moreover, shortly after they came to power, the country was awash with burgeoning opposition groups, which often resorted to violence. The country was also threatened with foreign invasion. It was in this context that the accused committed the crimes. The tensions and panic had compelled the authorities to use violent methods against those they regarded as counter-revolutionaries. The Court regarded the trialists' low level of education and the context in which they had committed the crimes as amounting to the extenuating grounds provided for by the law. Even if those grounds did not fall within the ambit of the mitigating circumstances expressly provided for by the law, the Court reasoned that it had the power to make its own assessment and determination of other circumstances which could be regarded as mitigating grounds.²³⁴ Accordingly, the Court identified and recognized the following circumstances raised by the accused as mitigating grounds: (1) the age of the accused and their ill health conditions; (2) the undue delay in starting the trial; (3) the fact that the accused had served the country in different capacities before they came to power; (4) the accused had shown remorse by asking the government to arrange a way for them to appeal to the victims for forgiveness; and (5) the fact that the accused had no previous criminal records.

Consequently, the Court rejected the SPP's request that the death penalty be imposed.²³⁵ By a majority vote of two to one, the Court sentenced a total of 55 convicted persons, 22 *in absentia*, on 11 January 2007.²³⁶ Similar to the conviction

²³¹ The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 766–775.

²³² Article 117 of the Criminal Code of 2004.

²³³ The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 767–770.

²³⁴ The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 767–773.

²³⁵ *Ibid.*

²³⁶ *Ibid.*, pp. 773–776; and see Annex Six.

judgment, the sentencing decision was not unanimous. But this time it was the presiding Judge, Medine Kiros, who dissented from the majority, amongst whom was Judge Nuru Said, who held a dissenting view on the conviction.²³⁷ The majority sentenced 48 convicted persons, including Mengistu, to rigorous life imprisonment;²³⁸ two received sentences of 25 years' rigorous imprisonment;²³⁹ and the remaining five received 23 years' rigorous imprisonment.²⁴⁰ The Court also ruled that the convicts who had been sentenced to life imprisonment were barred indefinitely from participating in public elections and from holding any public office.²⁴¹ The others were barred from participation in elections for five years from the time of their release.²⁴²

5.3.6.2 Presiding Judge Medine's Dissenting Opinion on the Sentencing Decision

The Presiding Judge, Medine Kiros, dissented from the majority decision on the sentences meted out to the convicted persons.²⁴³ He argued that all the grounds for imposing the death penalty were met. According to his reasoning, the circumstances presented as mitigating grounds by the accused did not qualify as mitigating grounds under the law.²⁴⁴ He explained that the law did not recognize the mitigating grounds put forward by the convicted persons.²⁴⁵ He specifically reasoned that their age and health conditions of the convicts were not recognized as

²³⁷ Federal High Court, the *Mengistu et al* case, Sentencing Judgment, Dissention Opinion of Judge Medine (2007), pp. 777–791.

²³⁸ The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 774–76. See Annex Six for the list of convicts who were sentenced to life imprisonment. The FHC First Criminal Division, when delivering the sentencing decision in the *Mengistu et al* case, took note of the fact that the Sixth Criminal Division of the same Court found guilty and sentenced five of the convicted persons in the instant case to death, namely, Convict Number 2, Melaku Tefera (FHC, Criminal File 013112/89), Convict Number 50, Eshetu Alemu (FHC Criminal File 921/89), Convict Number 51, Getachew Tekeba (FHC, Criminal File 914/89), Convict Number 60, Basha Kebede (FHC, Criminal File 960/89), and Convict Number 72, Kebede Keberet (FHC Criminal File 917/89). It stated that the life imprisonment would be enforced only when the death sentences imposed by the other Division would not get approval from the relevant authority. The *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 759, 771–772, and 776.

²³⁹ These were Wubshet Dessie and Sileshi Mengesha, accused nos. 12 and 19, respectively, see the *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 774–775.

²⁴⁰ These were Tegegn-Work Tesfa Hailu, Demsew Kassaye Mengesha, Kebede Abegaz Adem, Tamerat Feeye Bedo, and Manmeketot Wendemeteggn Belayeneh, accused nos. 31, 32, 35, 47 and 65 respectively. See the *Mengistu et al* case, Sentencing Judgment, FHC (2007), pp. 775–76.

²⁴¹ The *Mengistu et al* case, Sentencing Judgment, FHC, Order (2007), pp. 790–791.

²⁴² *Ibid.*

²⁴³ The *Mengistu et al* case, Sentencing Judgment, FHC, Dissenting Opinion of Judge Medine (2007), pp. 777–790.

²⁴⁴ Article 82(1) of the Criminal Code of 2004.

²⁴⁵ Articles 88(1)(a), 88(2) and 48(2) of the Criminal Code of 2004.

mitigating circumstances. He stated furthermore that these were factors that could be taken into account during the execution of sentences, but not as mitigating grounds. Based on the law, what should be taken into account in imposing punishment is the age and health condition of the accused persons at the time of the commission of the crimes, not at the sentencing stage. With regard to the lack of education of the accused, Judge Medine argued that this could not be regarded as an extenuating ground because one does not have to be educated to know that arbitrary killing and torture were reprehensible acts.²⁴⁶

He also lamented the fact that top *Derg* officials were given lenient penalties while low-level officials had already been sentenced to death and other severe punishments in the other Red Terror cases. In his view, this was paradoxical. Apart from this, Judge Medine argued that, even if some of the grounds presented by the convicted persons were to be recognized as extenuating grounds, they should not be taken into account in respect of those sentenced *in absentia*.²⁴⁷

In Judge Medine's opinion, the following grounds presented by the SPP should have been considered to be aggravating circumstances: (a) the fact that the accused committed serious and multiple crimes concurrently; (b) they meticulously planned, co-ordinated and executed their strategy to annihilate political groups by using various apparatuses of state; and (c) the fact that some of the accused had already been sentenced to severe penalties in other Red Terror trials should not have been overlooked.²⁴⁸ Therefore, in his opinion, the maximum penalty prescribed by the law should have been imposed on the convicted persons, as there were no mitigating grounds.

Consequently, in the opinion of Judge Medine, the nine convicted persons, including Mengistu,²⁴⁹ should have been sentenced to death, while 38 others should have been sentenced to life imprisonment,²⁵⁰ and the remaining seven to 25 years' rigorous imprisonment.²⁵¹

²⁴⁶ The *Mengistu et al* case, Sentencing Judgement, FHC, Dissenting Opinion of Judge Medine (2007), pp. 780–781.

²⁴⁷ *Ibid.*, p. 783.

²⁴⁸ The *Mengistu et al* case, Sentencing Judgment, FHC, Dissenting Opinion of Judge Medine (2007), pp. 784–787.

²⁴⁹ These were accused nos. 1, 2, 3, 5, 6, 7, 8, 9, and 11. The *Mengistu et al* case, Sentencing Judgment, FHC, Dissenting Opinion of Judge Medine (2007), p. 788. For a list of the accused in the *Mengistu et al* case, see Annex Five.

²⁵⁰ These included accused nos. 10, 12, 15, 17, 18, 20–22, 25, 26, 28, 29, 34, 40, 42, 43, 48–61, 64, 66, 68, 70, 72, 105, and 106. The *Mengistu et al* case, Sentencing Judgment, FHC, Dissenting Opinion of Judge Medine (2007), pp. 789–790. For a list of the accused in the *Mengistu et al* case, see Annex Five.

²⁵¹ These were the accused number: 16, 19, 31, 32, 35, 47 and 65. The *Mengistu et al* case, Sentencing Judgment, FHC, Dissenting Opinion of Judge Medine (2007), p. 789.

5.3.7 *Appellate Proceedings: Arguments of the Parties and Appellate Court's Decision*

As in many, if not all, legal systems, under Ethiopian law all parties aggrieved by the final decision of a lower court have the right to appeal to the Appellate Court—the Federal Supreme Court in the instant case.²⁵² The SPP appealed against the 11 January 2007 sentencing judgment of the Federal High Court in regards to 21 of the accused in the *Mengistu et al* case.²⁵³ Likewise, 13 respondents in the SPP appeal

²⁵² Article 21 of the FDRE Constitution; Article 9 of Proclamation 25 of 1996, Article 181 *et seq.* of the Criminal Procedure Code. The law stated that:

1. 'A convicted person may appeal against his conviction and sentence; Provided that no appeal may be lodged by a convicted person who has pleaded guilty and has been convicted on such plea except as to the extent or the legality of the sentence.
2. The public prosecutor may appeal against a judgment of acquittal, discharge or on the ground of inadequacy of sentence. [...] see Article 185 of the Criminal Procedure Code. It is noteworthy to mention that interlocutory appeal is not plausible. The relevant part of the law reads that: 'No interlocutory appeal shall lie from a decision of the court:
 - a. granting or refusing an adjournment under Article 94; or
 - b. regarding an objection under Article 131; or
 - c. regarding the admissibility or non-admissibility of evidence under Article 146,

but any such decision may form the subject of a ground of appeal where an appeal is lodged against conviction, discharge or acquittal.' See Article 184 of the Criminal Procedure Code.

²⁵³ The *SPP (Appellant) v Mengistu (Respondents) et al*, Judgment, FSC (2008), p. 2. The law stated that the party, aggrieved by the decision of the court, should as a matter of principle file notice of appeal and a memorandum of appeal within the period prescribed by law. See Article 187 of the Criminal Procedure Code. After the expiry of the period for appeal, the party can apply for leave to appeal out of time to the Appeal Court; see Article 191 of the Penal Code. In the appeal at bar, the parties lodged their respective appeal within the period prescribed by the law; hence, leave to appeal out of time was not relevant. But in other Red Terror cases, such as, in the Federal Supreme Court, *Alemeshet Haile Aferu (Accused-Applicant) v SPO (Respondent)* Criminal File 10843/2003, the accused applied for leave to appeal out of time. In this case, the appellant lodged an application for leave to appeal out of time against the conviction and sentencing judgment handed down by the Federal High Court, in *SPP v Abebe Melaku*, Criminal File No. 227/2001. The appellant was accused no. 35 in the trial case. He was found guilty and sentenced to five years' imprisonment. The period for appeal had expired, by two days. In his application, he alleged that the period for appeal had expired due to the registrar's delay in putting the necessary signature timeously on the notice of application (after receiving the notice of appeal, the registrar kept it for four days). Hence, the period expired due to a fault imputable to the registrar of the FHC. The SPP responded that the period had elapsed but, that if the FSC grants him leave to appeal out of time it would not object. The FSC decided that the argument of the appellant was not convincing. In other words, it was not satisfied that the delay was not occasioned by the default of the applicant. Therefore, the FSC denied him leave to appeal out of time. See *Alemeshet Haile Aferu (Applicant) v SPO (Respondent)*, FSC Criminal File 10843/2003, pp. 2–3. In the same vein, the FSC, denied an application for the leave to appeal, after expiry of the period against the decision of the Oromia Regional State Supreme Court, see the Federal Supreme Court, *Telomos Moniye (Applicant) v the SPP (Respondent)*, Decision on a Leave to Appeal out of time, Criminal Appeal File No. 8642/2003.

and 10 other accused appealed against the convictions and sentences of the Federal High Court in the same case.²⁵⁴ Initially, most of the accused appealed individually, but later the Federal Supreme Court, rightly so, joined the accused in their appeal.²⁵⁵ Pursuant to the law, the Supreme Court heard the arguments of the parties.²⁵⁶

5.3.7.1 The Special Public Prosecutor's Grounds of Appeal

The Federal High Court imposed life imprisonment on 19 accused, who were now respondents in the appeal,²⁵⁷ while the other two, namely, Major-General Wubeshet Dessie²⁵⁸ and Second Lt. Seleshi Mengesha,²⁵⁹ received 25 years imprisonment. The prosecutor appealed against this punishment by arguing that the sentence imposed by the High Court was lenient compared to the grave crimes for which the respondents had been convicted. Three of the respondents, Col. Mengistu Haile-Mariam, Col. Tesfaye Gebrekidan and Major Hadis Tedla, who were tried *in absentia*, were not present during the appeal, hence the ruling by the Supreme Court that the appeal proceeds *in absentia*.²⁶⁰ The appeal against Tesfaye Gebrekidan was discontinued because of his death in the Italian Embassy in Addis where he was sheltered.²⁶¹

Because of the systematic, continuous and 'exceptionally grave' nature of the crimes of which the respondents had been convicted, the SPP argued that the Trial Court failed to consider several aggravating factors, as a result of which the

²⁵⁴ The Federal Supreme Court, *SPP (appellant) v Mengistu et al (Accused-Respondents)*, Criminal File No. 30181 (2008), p. 3.

²⁵⁵ *SPP (appellant) v Mengistu (respondents) et al*, (2008), pp. 3–6.

²⁵⁶ Article 192 of the Criminal Procedure Code. See the *SPP (appellant) v Mengistu (Accused-Respondents) et al*, the FSC, (2008), p. 6. The law require the Appellate Court to fix the day for the appeal hearing upon receiving the memorandum of appeal. 'The President of the Appellate Court shall fix a day on which the appeal will be heard and the parties to the appeal shall be notified. The appellant shall open the appeal, the respondent shall reply and the appellant shall be entitled to reply.' See Article 191 of the Criminal Procedure Code.

²⁵⁷ These were: Colonel Mengistu Haile Mariam, Captain Fikre Selassie Wogderes, Colonel Fisseha Desta, Colonel Kasahun Tafese (died), Major Berhanu Bayeh, Captain Legesse Asfaw, Colonel Tesfaye Gebrekidan, Major Hadis Tedla, Lieutenant Colonel Endale Tessema, Captain Gessese Wolde-Kidan, Major Kassaye Aragaw, Colonel Debela Dinsa, Captain Begashaw Atalay, Colonel Nadew Zekarias, Lieutenant Petros Gebre, Second Lieutenant Aragaw Yimer, Lieutenant Aklilu Belayneh, Major Dejene Wondimagegnehu, and Lieutenant Desalegn Belay.

²⁵⁸ Accused no. 12 in the *Mengistu et al* case and respondent no. 11 in the *SPP (appellant) v Mengistu (respondents) et al*, the FSC, (2008).

²⁵⁹ Accused no. 19 in the *Mengistu et al* case, and in the appeal, he was respondent no. 15.

²⁶⁰ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC (2008), pp. 1 and 7. When the respondent is not present during the appeal hearing, the proceeding continues *in absentia*. See Article 193(2) of the Criminal Procedure Code.

²⁶¹ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, (2008), p. 6.

sentence it imposed was disproportional to the crimes they had committed. The SPP argued that the High Court should have meted out the highest penalty prescribed by the law, namely, the death penalty. In its memorandum of appeal, the SPP raised the following grounds of appeal:²⁶²

Legal error in Regard to the Mitigating Grounds Applied by the Trial Court

The SPP argued that the grounds that the Federal High Court considered as mitigating circumstances were devoid of legal basis and that the Court had thus made an error in law by citing grotesque factors as extenuating grounds.²⁶³ One of the grounds was the fact that the accused had shown remorse. The SPP argued against this by stating that throughout the trial the accused denied the charges against them and had never shown genuine remorse. Moreover, the SPP contended that the Federal High Court should not have taken into account the fact that the country was engulfed in a crisis as a mitigating ground for the horrible acts committed by the convicted persons. According to the SPP, the fact that the convicts executed imperial officials out of panic and the then prevailing circumstances was not an extenuating ground that fell squarely within the ambit of the law.²⁶⁴

Failure to Consider Aggravating Circumstances

The SPP stated that the Federal High Court should have taken into account multiple aggravating circumstances in meting out the penalty. These grounds include: (i) the commission of multiple serious crimes. The SPP argued that the accused were convicted of committing grave crimes. This is clearly recognized as an aggravating ground by the law.²⁶⁵ The SPP maintained that the Federal High Court had failed to consider or give apropos weight to this factor, and thus, did not impose a punishment which was commensurate with the crimes for which the respondents were convicted. Hence, the SPP entreated the Federal Supreme Court to take into account this factor and impose the maximum penalty; (ii) multiple victims: In respect of the harm caused to the victims, the SPP submitted that the accused who were members

²⁶² In the memorandum of appeal, the appellant '[...] shall set forth concisely and under distinct heads the grounds of objection to the judgment appealed against without any arguments and such grounds shall be numbered consecutively. The memorandum shall be accompanied by a copy of the judgment appealed against. The memorandum of appeal shall state the nature of the relief that is sought.' See Article 189(1) of the Criminal Procedure Code. The law did not outline the specific ground/s for admissibility of an appeal.

²⁶³ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, (2008), p. 7.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*, p. 8.

of the Standing Committee had been found guilty for virtually all their acts, which resulted in the loss of the precious lives of thousands of victims, as confirmed by the Trial Court.²⁶⁶ The high number of victims of serious crimes perpetrated by the convicts should have served as a ground to aggravate the punishment and thereby attract the maximum punishment prescribed by the law;²⁶⁷ (iii) conviction and/or sentencing in other Red Terror trials should not have been overlooked. The SPP asserted that as the Federal High Court had convicted (and/or sentenced)²⁶⁸ some of the accused in other Red Terror trials, it should have taken this into account when it imposed punishment in the instant case.

In general, the SPP argued before the Federal Supreme Court that, because the Federal High Court had failed to consider such aggravating circumstances, it had imposed a disproportionate sentence. The SPP consequently requested the Appellate Court to take into account the factors it had enumerated and to impose the death penalty on all the respondents.

Severe Punishment (Death Penalty) for the Policy and Decision Makers

The other middle and lower level accused, such as the revolutionary guards, had received the maximum penalty, the death sentence, for carrying out the plans of the masterminds during the Red Terror.²⁶⁹ Nonetheless, the prominent figures, the respondents in the instant case, received a lesser punishment. The SPP argued that those who hatched the terror, namely, the masterminds, should not have received a lesser punishment than the people they used as instruments to commit the crimes. Simply put, those who originated and coordinated the orchestration of the ‘red terror’ should not receive a lesser punishment than those whom they had instructed to carry out the plans.²⁷⁰

In sum, the SPP argued that the Federal High Court ignored the above-mentioned circumstances, which would have led to the imposition of the maximum penalty proportionate to the crimes for which respondents were found guilty. More to the point, the SPP argued that there was no ground that legally precludes the imposition of the death penalty on the respondents. The SPP,

²⁶⁶ It is worth mentioning that the SPP did not raise the defenseless nature of most of the victims as a ground for aggravation of the sentence. Despite the fact that this was explicitly recognized as an aggravating circumstance under the law, the SPP did not invoke it. See Article 81(1) of the Penal Code.

²⁶⁷ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, (2008), p. 8.

²⁶⁸ According to the SPP, some of the accused were convicted and sentenced by the Federal High Court, while the sentencing of others was postponed so that it would be decided in the *Mengistu et al* case. However, the High Court did not take into account those prior conviction decisions when deciding on sentence in the latter case.

²⁶⁹ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, (2008), p. 8.

²⁷⁰ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, (2008), p. 8.

therefore, sought relief in the Federal Supreme Court in the form of its imposing the death penalty on all the respondents.²⁷¹

5.3.7.2 The Submissions of the 21 Respondents

In their request to the Federal Supreme Court to dismiss the Appeal, the respondents averred the following: (a) the mitigating grounds that the Federal High Court took into consideration were all recognized under the law. They insisted that remorse was one of the extenuating grounds recognized by the law. Since they maintained that they had shown remorse, it was appropriate for the High Court to have considered this as a mitigating ground;²⁷² (b) the requirements for imposing capital punishment were not met, hence the death sentence was out of the question.²⁷³ What is more, so the argument of the respondents ran, several countries had abolished the death penalty. The imposition of the death penalty was therefore not in keeping with the trend, which made the death sentence unacceptable; and (c) the purpose of punishment is not to carry out a vendetta, but is deterrent in nature, hence a fair and proportionate punishment should be imposed to achieve this end.²⁷⁴

It is submitted that, before discussing the Appellate Court's decision, it is judicious and also logical, to first discuss the appeal by the accused against the Federal High Court's conviction and sentence decision, as the Court did.

5.3.7.3 Appeal by the Accused against the Conviction and Sentencing Decision of the Federal High Court

Twenty-three convicted persons filed an appeal against the conviction and sentencing judgments of the Federal High Court in the *Mengistu et al* case. Of these, 13 were respondents in the SPP appeal. All the appellants were convicted in the main Red Terror case, the case of *Mengistu et al*. The appellants initially appealed individually; however, at a later stage, due to the similarities of the arguments and grounds raised by the respondents, the Appellate Court decided to join their appeals.²⁷⁵ The grounds of appeal submitted by the respondents could be summarized as follows: (a) the evidence tendered by the SPP did not prove the case beyond a reasonable doubt.²⁷⁶ The appellants denied the commission of the acts of which the Trial Court found them guilty. They stated that the large number of

²⁷¹ Ibid., p. 9.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Ibid., p. 15.

²⁷⁶ Ibid., p. 10.

witnesses called by the SPP had not mentioned the names of any of the accused, let alone did they prove the specific acts that they were alleged to have committed. Similarly, they contended that the documentary evidence did not constitute proof of the alleged acts beyond a shadow of a doubt.²⁷⁷ Apart from this, the appellant maintained that none of the documents adduced as evidence mentioned their names; most of the documents tendered by the SPP were copies that should have been inadmissible as evidence.²⁷⁸ They argued that the Federal High Court convicted them, not because the SPP had proven its case beyond a reasonable doubt, but because of their membership of the *Derg*.²⁷⁹ Their contention was, therefore, that membership of the *Derg* should not have been used as a ground to convict them; (b) furthermore, the appellants contended that acts committed by the *Derg*, which was the legitimate government of Ethiopia, should not have been considered as crimes.²⁸⁰ In light of these averments, the appellants insisted that they should not have been prosecuted for carrying out such acts; (c) the appellants stated that they had, in fact, defended their case successfully.²⁸¹ In their opinion, even though the SPP had not proven its case ‘we have successfully proven our innocence’;²⁸² and (d) additionally, the appellants claimed that there was no legal basis to have been convicted for the commission of the crime of political genocide.²⁸³ They argued that their conviction for genocide against political groups on the basis of the Penal Code was against international law. The reason they advanced for the contention was that killings or other acts against political groups could not be regarded as genocide since this was, and still is, not recognized under international law as such. The fact that the Penal Code provided for genocide against political group was contrary to international law, and hence void, which meant that they should not have been convicted of genocide against political groups.

The relief that the appellants sought in the Appellate Court were, therefore, the grounds on which they based their arguments entitled them to have the conviction set aside and that they be acquitted. In the alternative, the appellants requested a reduction of the sentences imposed by the Trial Court.²⁸⁴ If the conviction were to be confirmed, they requested the Federal Supreme Court to impose a lesser sentence due to the several mitigating circumstances.

²⁷⁷ Ibid., p. 10.

²⁷⁸ Ibid., p. 10.

²⁷⁹ Ibid., p. 10.

²⁸⁰ Ibid., p. 11.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

5.3.7.4 The Special Public Prosecutor's Reply to Appellants Arguments

The respondent, the SPP, requested the Federal Supreme Court to dismiss all the grounds of appeal set out by the appellants for the following reasons: (a) the crimes committed by the *Derg* were immutable and that appellants were responsible for the decision made by the *Derg*, as they themselves were members and representatives of the *Derg*, for it could not have existed without them.²⁸⁵ The decision of the *Derg* was, therefore, the decision of its members. Since the appellants were and remained *Derg* members until its final day, decisions of the *Derg* were attributable to them. Hence, the *Derg*'s policy of eliminating all political opponents was attributable to its members; (b) the crimes were proven beyond a reasonable doubt both by testimonies and documentary evidence, such as, the minutes of *Derg* meetings.²⁸⁶ With respect to the error in law in respect of the admission of evidence, the SPP replied by stating that the commission of crimes was proven by documents of the appellants own making. For instance, in respect of the execution of Haile Selassie's officials (count 1 of the second charge), in the minute of the *Derg* that was tendered as evidence at the trial, it was clearly stated that the appellants had decided how, where and when to execute the victims. According to this very same document, they had also received a report of the execution. In respect of the question of the admissibility of the documentary evidence, the SPP contended that all copies were authenticated, meaning that the charges were proven beyond a reasonable doubt; (c) the SPP declared furthermore that the appellants failed to cast a shadow of doubt on the evidence that it had adduced;²⁸⁷ and (d) a further contention by the SPP was that genocide against a political group was recognized under Article 281 of the Penal Code.²⁸⁸ In respect of the contention on the conviction for political genocide that the appellants raised, the SPP outlined that the Penal Code extended protection against genocide to political groups. The SPP refuted as baseless the assertion that the inclusion of this provision in the Penal Code was against the Genocide Convention. The conviction of the appellants by the Trial Court, in the opinion of the SPP, was, therefore, appropriate and based on law. Given these arguments, the SPP requested the Appellate Court to reject the relief sought by the appellants, namely, that the conviction be quashed.

As regards the sentence meted out by the Federal High Court, the SPP repudiated as legally unfounded the mitigating grounds that the appellants had raised. Accordingly, the SPP requested the Appellate Court to dismiss the appeal.²⁸⁹

²⁸⁵ Ibid., p. 13.

²⁸⁶ Ibid., pp. 13–14.

²⁸⁷ Ibid., p. 14.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

5.3.7.5 Determination of the Appellate Court

The Appellate Court has no power to interfere with the decisions of lower courts unless there are sufficient grounds to do so.²⁹⁰ Therefore, in the appeal at bar, the Federal Supreme Court needed to determine, first, if there was a reasonable ground to review the decision of the Trial Court. The section below discusses the Appellate Court's determination on the appeal of 23 appellants and will then go on to deal with the SPP's appeal in respect of the 21 respondents. Since the accused had appealed against their conviction, it makes sense to discuss first what the Appellate Court held in their case.

Dismissal of the 23 Appellants Appeal

In weighing 23 appellants' argument, the Federal Supreme Court examined first whether their conviction had been based on sufficient evidence. The Court endorsed the SPP's arguments, holding that the prosecution had proven beyond a reasonable doubt that the appellants, as members of the *Derg*, were involved in the commission of the acts outlined in the charges.²⁹¹ The Court went on to say that it had been proven that the appellants decided to execute the imperial officials and that they had then announced that the killing of such opponents would not be regarded as spilling the blood of innocent people.²⁹² In other words, the Appellate Court affirmed that the appellants had planned and carried out the elimination of political rivals. Moreover, they had established several institutions for implementing this plan.²⁹³

²⁹⁰ The law which outlined the power of the appellate court reads:
'Article 195. Powers of court of appeal.

- (1) At the hearing of an appeal the court of appeal shall dismiss the appeal where there is no sufficient ground for interference.
- (2) Where it considers that there is sufficient ground for interference, the court of appeal may:
 - (a) on an appeal from an order of acquittal or discharge reverse such order and direct that the accused be retried by a Court of competent jurisdiction or; find him guilty and sentence him according to law; or
 - (b) on an appeal from conviction and sentence:
 - (i) reverse the finding and sentence and acquit the accused; or
 - (ii) with or without altering the finding, maintain, increase or reduce the sentence;
 - (c) on an appeal from conviction only reverse the finding and sentence and acquit the accused;
 - (d) on an appeal from sentence only maintain, increase or reduce the sentence.
- (3) Where the court of appeal confirms the conviction but alters the sentence or vice versa a second appeal shall lie only in respect of the conviction or sentence which has been altered.

²⁹¹ The *SPP (appellant) v Mengistu (respondents) et al*, the Federal Supreme Court, Criminal File No. 30181(2008), pp. 16–19.

²⁹² The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 22.

²⁹³ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 24.

Afterwards, they even received reports of the executions from those who had carried them out.²⁹⁴ According to the Court, there was, therefore, no shred of doubt about their determination to commit the killings as well as other acts.²⁹⁵ After making this determination, the Appellate Court proceeded to establish whether the said acts could be regarded as genocide against political groups.²⁹⁶ The Appellate Court then, on an individual basis, determined whether the acts of which the appellants had been convicted could legally be regarded as genocide against political groups under the Penal Code.²⁹⁷ The Court framed this as one of the issues it had to address specifically.²⁹⁸ The Federal Supreme Court confirmed that the Penal Code gave protection to political groups.²⁹⁹ In dealing with the appellants' argument on the inclusion of a political genocide under the Penal Code, the Court rightly pointed out that the appellants had not contested the criminalization of politicide under the Penal Code.³⁰⁰ Indeed, they had argued that the inclusion of political genocide under the Penal Code ran in the face of the Genocide Convention which Ethiopia had ratified. Hence, they contended that the Federal High Court had erred in convicting them on the basis of an invalid law which should not have encompassed politicide from the very outset. But the Federal Supreme Court came to the conclusion that the inclusion of politicide under the Penal Code was not contrary to the Genocide Convention.³⁰¹ This is so because the Convention does not have any express prohibition of signatory states extending protection for political groups under their laws. What the Convention did was not to give protection to political groups against genocidal acts. By exercising its sovereign legislative authority, Ethiopia has legitimately extended protection to political groups. This action could not be regarded as something that was contrary to the Genocide Convention, but was rather a progressive step taken by a signatory state. The Penal Code filled the loophole in the Convention. Thus, political groups are protected against genocidal acts under Ethiopia's law.

The Appellate Court then put the law to the test by establishing whether the acts could be regarded as political genocide. The Federal Supreme Court had endorsed the fact that virtually all the acts were committed with intent to eliminate political opponents, hence they amounted to genocide against political groups.³⁰² Interestingly, the Federal Supreme Court pointed out that some of the counts could

²⁹⁴ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 25.

²⁹⁵ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), pp. 16–60.

²⁹⁶ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 26.

²⁹⁷ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 26.

²⁹⁸ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 66.

²⁹⁹ In doing so, the Supreme Court made reference to the new Criminal Code. The Court stated that the new Criminal Code in much clearer terms included political groups as one of the groups protected against genocidal acts. See the *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), pp. 68–71.

³⁰⁰ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 69.

³⁰¹ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 70.

³⁰² The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), pp. 70–71.

not legally be regarded as genocide against political opponents. Because they were not committed for a political reason or the prosecutor did not sufficiently prove the special intent of the appellants.³⁰³ However, the Court refrained from re-characterizing (or amending) those counts. The reason that the Court put forward for not interfering was that doing so would jeopardize the situation of the appellants. It is questionable though whether the Appellate Court has such power to refrain from intervening once it has found that there is a ground to interfere. Nevertheless, the Appellate Court was not persuaded by the appellants' arguments against the conviction. Hence, it dismissed the appeal and confirmed the conviction judgment of the High Court. It is submitted, however, that there was a clear ground for the Court to alter some of the counts and convict the appellants of aggravated homicide.

In general, the Court rejected the appellants' arguments against the conviction judgment of the Federal High Court. To put it succinctly, it upheld the conviction judgment of the High Court against all the appellants.³⁰⁴ With respect to appellants' appeal on the sentence, the Federal Supreme Court decided that there is no ground for mitigating the sentences imposed on them. Hence, the Court dismissed the appeal.³⁰⁵

Appellate Court's Decision on the Special Public Prosecutor's Appeal

As outlined above, the SPP argued that the Federal High Court erred in determining the sentence as it had not taken into consideration the aggravating grounds that it

³⁰³ The *SPP v Mengistu et al*, the FSC, Criminal File No. 30181(2008), p. 25, and pp. 71–73. Accordingly, the Court outlined that for six counts of killing that resulted in the death of 74 individuals, the appellants should have been convicted on the alternative charge, aggravated homicide, instead of genocide. Nevertheless, the Court refrained from altering the High Court's conviction judgment. The counts were the following: count one (killing of Haile Selassie's officials), count two (killing of Tadesse Biru and five others); count five (killing of Emperor Hailse Selasie); Count 10 (killing of Atenafu Abate); Count 38 (killing of Teferi Benti and seven others); and count 91 (killing of Abune Teflosiwos Wolde-Mariam). These counts were contained in the second charges. In the case of Abune Teflosiwos, the Court stated that the reason for his killing was not proven beyond a reasonable doubt; hence, special intent is lacking. In other cases, the Court stated that the special intent is lacking since most of the killings were carried out for non-political purposes. The Court stated, in explaining why it should leave the High Court's conviction judgment unchanged with regard to these counts that the change would result in aggravation of penalty for the appellants. In the interest of fairness, the Court refrained from altering the counts from genocide to aggravated homicide. This is simply not correct for two reasons: (a) the Court could have rectified the conviction and left the sentencing untouched; and (b) even if the alteration might have resulted in aggravating the penalty, at the end it would be inconsequential because the Court went to impose the maximum penalty.

³⁰⁴ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, Criminal File No. 30181(2008), pp. 73–74.

³⁰⁵ The *SPP (appellant) v Mengistu (respondents) et al*, the FSC, Criminal File No. 30181(2008), pp. 75–76.

should have taken into account. Moreover, the SPP contended that the Federal High Court erred in taking into account some factors, which had no legal basis, as mitigating grounds. Hence, it imposed a disproportionate punishment on the convicted persons. It requested the Supreme Court to impose the maximum penalty that the law provided for those crimes for which the convicted persons were found guilty.

The Federal Supreme Court first evaluated whether or not the conditions for imposing the death penalty had been met. The Court confirmed that the five prerequisites for imposing the death penalty, namely, that the accused must have attained the age of 18, the crime must have been a grave crime and completed crime, the convict should be an exceptionally dangerous criminal, and the law must expressly provide for the death penalty, had been met.³⁰⁶ The only condition that was not met, according to the Federal High Court's finding, was the sixth one, namely the absence of mitigating grounds. To reiterate what the High Court said, there were mitigating grounds, such as lack of education, a show of remorse by the accused, social and political instability and fear of losing political power, hence, the death penalty could not be imposed. In respect of the five conditions for imposition of the death penalty, the Appellate Court endorsed the finding of the Federal High Court. However, when it came to the absence of mitigating grounds it stated that the factors that the Federal High Court took into account could not legally be regarded as mitigating circumstances. The Appellate Court reasoned that lack of education (low awareness about the nature of crimes) could not convincingly be considered as mitigating grounds in the present appeal because all of the respondents were trained soldiers and officials who were supposed to respect the law. Moreover, since they did not show sincere remorse, this could not be adjudged to be a mitigating factor in the imposition of sentence. Indeed, the respondents had continuously denied the charges against them and were never apologetic. With regard to political instability and panic as reasons to commit crimes, the Appellate Court held that most of the victims were defenseless and imprisoned, so they were not able to pose a threat to the respondents. These circumstances, therefore, could not be regarded as a mitigating factor. The Appellate Court went on to hold that circumstances, such as, the respondents' advanced age, their ailments, the protracted nature of the proceedings, as well as their not having prior criminal records, did not qualify as grounds for mitigation of sentence in the case at hand.

The Appellate Court reasoned that there were, in fact, more aggravating than mitigating circumstances in the instant case. For example, the fact that the respondents committed grave crimes against multiple defenseless victims, in itself aggravates the penalty. Moreover, some of the respondents had already been convicted of grave crimes in other Red Terror cases and/or some respondents were sentenced or their sentences were suspended until the Trial Court handed down its verdict on the respondents in the *Mengistu et al* case. This should have aggravated the penalty.

³⁰⁶ For a discussion of the conditions for imposition of the death penalty, see *supra* Sect. 5.3.6.1.

These then were grounds for rejecting the respondents' submissions. Therefore, the Appellate Court decided that the conditions for imposition of the death penalty were met. By doing so, it concluded that the Federal High Court erred in taking into account factors that should not have been considered as mitigating circumstances in the present case. In addition, the Appellate Court held that imposing the death penalty was consistent with the Penal Code and that this punishment should not be considered as a vendetta, but rather as a proportionate response to the acts of exceptionally dangerous perpetrators of egregious crimes. In other words, if the conditions for imposing the death penalty were met, meting out the death penalty would serve as a lesson that would deter potential criminals. There was, therefore, no reason for not imposing the death penalty.

Accordingly, the Federal Supreme Court, by exercising its power to interfere in the decisions of lower courts altered the sentence imposed by the Federal High Court. The Appellate Court then sentenced 18 respondents to death as requested by the SPP. In its decision, the Court noted that penalty would be enforced subject to the endorsement of the President of the country. The death penalty was not carried out against those who had been in prison since it did not win the approval of the Head of State.

The discussion now turns to the commutation of the death penalty to life imprisonment and the subsequent release of senior *Derg* officials on parole.

5.4 From Pardon to Release on Probation

Ethiopian law states unequivocally that the death penalty cannot be carried out without the approval of the Head of Government.³⁰⁷ This means that the Head of Government has the power to pardon someone who has received the death sentence if he so wishes. The power to pardon the death penalty is entrusted to an organ of the Executive and not to the Judicial and Legislative organs of state. A pardon can thus be regarded as an act of clemency exercised by an executive organ. The law that vests the Executive with this power states expressly as follows: 'Unless otherwise provided by law, a sentence may be remitted in whole or in part or commuted into a penalty of a lesser nature or gravity by an act of pardon of the

³⁰⁷ 'Death sentence shall not be carried out unless confirmed by the Head of State. It shall not be executed before ascertainment of its non-remission or non-commutation by pardon or amnesty.' see Article 117(2) of the Criminal Code of 2004. See also Article 119 of the Criminal Procedure Code of 1961; Article 2(1) Procedure of Granting and Executing Pardon Proclamation 840 of 2014; and the Constitution explicitly confers the power to grant a pardon on the President. The law reads: 'He [the President] shall, in accordance with conditions and procedures established by law, grant pardon.' Article 71(7) of the FDRE Constitution. See Article 5(1) the Procedure of Granting and Executing Pardon Proclamation 840 of 2014, and Article 10 the Procedure of Pardon Proclamation 395 of 2004. The latter was the law in force at the time of the pardoning of the *Derg* officials. It is repealed by the Procedure of Granting and Executing Pardon Proclamation 840 of 2014.

competent authority.³⁰⁸ From this, it is clear that a pardon is a remission of sentence or the altering of a severe penalty to lesser or more lenient punishment. The question is whether or not the Head of Government has authority to exercise this power in respect of persons who have been found guilty of the crime of genocide or other serious crimes. The fountainhead of the law, the FDRE Constitution, states that sentences imposed in relation to offences, such as, crimes against humanity, genocide, and torture, ‘may not be commuted by amnesty or pardon of the legislature or any other state organ.’³⁰⁹ In such cases, the only thing that the Executive can do is to commute the death sentence to a life sentence.³¹⁰ In other words, no provision is made for a remission of sentence or a reduction of sentence in such cases.

Pardon is a privilege accorded to convicted persons; it is not a right to which they are entitled. The law prescribes the procedure that must be followed where someone applies for a pardon.³¹¹ In principle, in order for convicted persons to benefit from a pardon, they should lodge a petition for pardon with the Pardon Board³¹² in accordance with the law.³¹³ The petition can be lodged at any time after the court has handed down its sentence.³¹⁴ Accordingly, the 23 *Derg* officials who had been sentenced to death lodged petition to be pardoned by the Pardon Board.³¹⁵ On 26 May 2011, the Pardon Board, at its 11th and 12th ordinary meetings unanimously supported the petition and wrote a recommendation to the President for commutation of the death penalty to life imprisonment.³¹⁶ The Board favored

³⁰⁸ Article 229 of the Criminal Code. Cf. with Article 239(1) of the Penal Code which reads as follows: ‘A sentence may be remitted in whole or in part or commuted into a penalty of a lesser nature or gravity by an act of pardon of the sovereign power.’

³⁰⁹ Article 28(1) of the FDRE Constitution.

³¹⁰ The second paragraph of the provision states that: ‘In the case of persons convicted of any crime stated in sub-Article 1 of this Article and sentenced with the death penalty, the Head of State may, without prejudice to the provisions hereinabove, commute the punishment to life imprisonment.’ See Article 28(2) of the FDRE Constitution.

³¹¹ Proclamation 395 of 2004.

³¹² The law established the Board of Pardon that has the power to examine and evaluate pardon petition and thereafter make recommendations thereon to the President, see Articles 3 and 15. For details on members and powers of the Board, see Articles 4–9 Proclamation 395 of 2004. Cf. Articles 6 through 13 Proclamation 840 of 2014.

³¹³ The law stated that ‘[a]ny person who is convicted and sentenced by a court may, unless the granting of pardon is prohibited by law, apply for pardon in person or through his spouse, close relatives, representative or lawyer’ Article 12(1) Proclamation 395 of 2004. For the content of the petition, see Article 13 Proclamation 395 of 2004. Cf. Article 15–16 Proclamation 840 of 2014.

³¹⁴ Article 14 Proclamation 395 of 2004. Cf. Article 17 Proclamation 840 of 2014.

³¹⁵ The applicants requested complete release.

³¹⁶ Pardon Board 11th and 12th Ordinary Meetings Minute, 2011; and

Letter, the FDRE Ministry of Justice Pardon Board to the FDRE President Office, No. 170-5-83/2011, 18 May 2011, signed by the then Minister of Justice, Assefa Kesito. Members of the Pardon Board who were present during the meeting were Berhanu Hailu (chairperson), Mersa Reda, Wondimu Hailu, Pastor Daniel Mengistu Tufa, and Mulugeta Ayalew (secretary). Dr. Yared Asemra was not present.

commutation for the 23 senior *Derg* officials for the following reasons: (a) the applicants had spent a long time behind bars; b) the applicants had shown remorse; (c) it was necessary that the Government show clemency rather than continue a vendetta; and (d) there had been pleas made by religious leaders that the pardoning of former senior *Derg* officials would symbolize the need for reconciliation and forgiveness. However, the Association of Red Terror victims and families rejected this plea by religious leaders to seek pardon and reconciliation.³¹⁷ Nevertheless, the Board went ahead with its recommendation for commutation.

Upon receipt of the recommendation of the Pardon Board, the President has the power to deny or grant a pardon.³¹⁸ The then FDRE President, Girma Wold-Giorgis, granted pardon to the 23 *Derg* officials on 28 May 2011.³¹⁹ He stated that:

with the intention of closing this historical chapter and enabling our fellow citizen speeding up the ongoing development, democracy and good governance with a full capacity and unified spirit; believing its contribution can bring forth our unified spirit among our fellows, it is decided to commute the death sentence that has been passed to 23 *Derg* officials to life imprisonment.³²⁰

The decision to pardon became effective as of 28 May 2011.

The Presidential pardon came at the time when most of the pardoned officials had already spent 20 years behind bars. The legality of the pardon is less

³¹⁷ Red Terror Martyrs Museum, The Association's declaration of standing-point on the peace and reconciliation by the *Derg* Officials, available at <http://rtmmm.org/news.html>. Accessed 12 June 2016.

³¹⁸ The law stated that: 'The President may grant or deny pardons based on the recommendations of the Board or on his own appreciation of the facts'. [...] Article 10(1) Proclamation 395 of 2004.

³¹⁹ Decision Given by the Office of the Presidency, Letter No. 609/2011), on 28 May 2011. In the event held at the National Palace, the President made an announcement on National Television that all the former high-ranking *Derg* officials were pardoned, meaning that the death sentences had been lifted and reduced to life imprisonment, see ETV News Ethiopia commutes death sentences for 23 *Derg*-officials available at <http://www.ethiotube.net/video/14212/> (in Amharic). Accessed 20 June 2016. For news coverage on the commuting of the officials, see Voice of America 2011, Ethiopia Commutes Death Sentences for Former Officials Accused of Genocide, available at <http://www.voanews.com/content/ethiopia-commutes-death-sentences-for-mengistu-officials-22960723/158216.html>. Accessed 20 June 2016. Against Death Penalty in the World, Ethiopia Pardon 23 Top *Derg* Officials, available at http://www.handsoffcain.info/archivio_news/201106.php?iddocumento=15307341&mover=2. Accessed 20 August 2014.

³²⁰ ETV-News, Ethiopia commutes death sentences for 23 *Derg* officials available at <http://www.ethiotube.net/video/14212/> (in Amharic). Accessed 20 June 2016. The late Patriarch of the Ethiopian Orthodox Church, Abune Paulos, stated at the event that 'there is no half forgiveness. In their pardon request, the prisoners urged the government to release them completely from prison so that they will spend the remaining few years of their lifetime with their children. I hope and believe that our government will fully release them from prison.' Similarly, Sheikh Elias Redman, leader of the Muslim community, speaking at the event, asked the government to consider freeing the officials. The President replied to the request by stating that the relevant authorities would review it in accordance with the law.

contentious as it was done in harmony with the law.³²¹ However, the pardoning process was criticized because of the lack of adequate participation of victims or their representative in the process. It is submitted that the government should have prepared and organized a forum in which the sentenced *Derg* officials could have been given an opportunity to apologize to the victims and to the nation. This would have averted the dissatisfaction and remonstrations by the victims, thus bringing to close the horrific chapter through forgiveness.

Be that as it may, the pardon can be regarded as a prelude to, or setting of the stage for, the subsequent release of the *Derg* officials on parole, as under Ethiopian law, a person who is sentenced to life imprisonment has to serve 25 years. Upon serving two-thirds of the sentence, he can apply for an anticipatory release.³²² The law plainly states that in cases of life imprisonment, the prisoner can be eligible to apply for release on probation after serving 20 years.³²³ Since most of the pardoned officials had served 20 years by the time they were pardoned, they were eligible to apply for parole.

³²¹ The former Justice Minister, Berhanu Hailu, stated that the commuting of the death sentences of 23 former *Derg* officials to life imprisonment is a constitutional act, ETV News, 'Ethiopian Justice Minister Ato Birhan Hailu discusses the pardoning of 23 former *Derg* officials' (in Amharic) at <http://www.ethiotube.net/video/14224/ETV-News-Ethiopian-Justice-Department-says-reducing-the-Derg-officials-sentence-to-life-in-prison-is-constitutional>. Accessed 25 August 2015.

³²² The relevant provision reads: 'Where a prisoner has served two-thirds of a sentence of imprisonment or twenty years in case of life imprisonment, the Court may, on the recommendation of the management of the institution or on the petition of the criminal, order conditional release:

- a. if, during the requisite period of performance of the penalty or the measure entailing loss of liberty, the criminal, by his work and conduct, gave tangible proof of his improvement; and
- b. if he has repaired, as far as he could reasonably be expected to do, the damage found by the Court or agreed with the aggrieved party; and
- c. if the character and behaviour of the criminal warrant the assumption that he will be of good conduct when released and that the measure will be effective. [...]' Article 202 of the Criminal Code. Cf. Articles 206–212 of the Penal Code.

³²³ Cf. Article 110 of the Rome Statute. Accordingly, for reduction of sentence in the case of life imprisonment the convict has to serve 25 years. Under international instruments early release is also permissible. It is on the basis of this provision that the sentence of Germain Katanga was reduced in November 2015. See ICC, *The Prosecutor v. Germain Katanga* Decision Review Concerning Reduction Of Sentence, Appeal Chamber, ICC-01/04/01/07 13 November 2015. In the ICTR as well, some defendants have benefited from the regime of early release. ICTR, *Prosecutor v. Bagaragaza*, Decision on Early Release of Micheal Bagaragaza ICTR-05-86, President, 24 October 2014. However, early release is not an entitlement. The ICTR President denied early release to Rutaganira. See ICTR, *Prosecutor v. Rutaganira*, Decision on Request for Early Release, ICTR-95-1C, President 2 June 2006; and ICTR, *Prosecutor v. Rutaganira*, Decision on the Motion for Reconsideration of Denial of Request of Early Release, ICTR-95-1C, President, 28 February 2008. For general discussions of the doctrine of early release see Choi 2014, pp. 1784–1828; and Elberling 2012, pp. 118–137.

A few months after the pardon, 16 of the 23 pardoned former Derg officials were released from prison. It was reported that the others would also be released after serving the minimum prison term that is 20 years.³²⁴

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³²⁴ It is not clear whether there has been a subsequent release of the remaining *Derg* officials who have been serving their prison terms.

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Chapter 6

Stocktaking of the Red Terror Trials: Is It an Approach Worth Emulating?



Abstract Ethiopia dealt with *Derg* crimes by resorting to extensive prosecution as a transitional justice mechanism. Similar to some other transitions from a repressive past, the success or otherwise of Ethiopia's transition from the repressive *Derg* autocracy is open to debate. The transition has some striking shortcomings; however, this is not the only commentary to be made about the Ethiopian transition, for doing so would have amounted to the telling of a single story. There is nevertheless something to be learned from it. This chapter takes stock of the pitfalls of the trials and the transition in general, and also looks at the contributions or achievements of the Ethiopian transition from the *Derg* past.

Keywords Politicide • Victor's justice • Trial *in absentia* • Protracted trial • Narrow slice of truth • Death penalty • Summary justice • Legal legacy

6.1 Criticisms or Pitfalls of the Ethiopian Transition—The Red Terror Trials

As aptly noted, 'historic occurrences are never free from at least some objectionable aspects.'¹ Likewise, there are certain negative features associated with the Red Terror trials, and generally, with the Ethiopian transition from the *Derg* to the Ethiopian People Revolutionary Democratic Front (EPRDF). These include trial *in absentia*, the use of the death penalty, inadequate transitional justice mechanisms, and delayed justice.

6.1.1 Trials of the Vanquished: Victor's Justice

The Red Terror trials are denounced as selective, hence incurring the appellation 'victors justice'. *Derg* officials, including those in exile, denied and denounced the charges laid against them.

¹ Tomuschat 2006, p. 837.

One of the plausible critiques against the enforcement of international criminal law by the domestic justice machinery is the selectivity aspect. This does not mean that international criminal courts, too, have not been criticised for their selectivity. Indeed, since its advent, international criminal justice has never escaped from selectivity critics.² The recent AU's claim of the ICC's selectivity is one of the prominent examples.³

When Hermann Goering received the indictment from the Nuremberg Tribunal, he stated that 'the victors will always be the judge and the vanquished the accused'.⁴ Likewise, the *Derg* officials considered the charges and trials as victor's justice against the vanquished, with the aim to settle scores. Mengistu stated that 'the charges were a lie and the trial was merely the vengeance of the victors in a war that [had] been fought to preserve the unity of the country, a war that the force of unity—his forces—had lost.'⁵

It is true that institutions that were set up by the victorious groups carried out the investigation and prosecution of *Derg* crimes. It is also true that those who were prosecuted and found guilty were only those who were part of the defunct *Derg* administration in one way or another. In other words, alleged crimes committed by other groups, including the conquered civilian and armed groups, and members of the current government (EPRDF/ TPLF), were precluded from the scope of the SPP's mandate. Despite the fact that the crimes allegedly committed by the civilian and armed groups had been brought to the fore, there was a narrow conception of what and who perpetrators were. Although the ordinary prosecutorial authority had the power to investigate crimes that were allegedly committed by non-*Derg* members, it has not done so. Hence, crimes committed by the civilian and armed groups as well as members of the current government went unpunished. Simply put, the victorious rebel groups and the defeated civilian and armed groups were spared. This undoubtedly makes the Red Terror trials a kind of victor's justice, as they were an accountability mechanism that the victors carried out against the officials and associates of the predecessor regime that they had defeated—the vanquished. Succinctly put, in spite of the fact that the killings were not one-sided, at the end of the accountability process it was only the *Derg* officials who were blamed and found guilty for the crimes that had been committed during the *Derg* reign.

However, this does not mean that the Red Terror trials were mock trials that the victorious successor regime used as a vendetta against the predecessor regime's officials. The prosecution of *Derg* officials for the crimes they had committed was

² An allegation of selectivity (why only the German War Criminals, Hutus, Serbs, and recently, why only Africans), has been there since the birth of international criminal justice. Some are well-founded criticisms, others not. But most of the allegations have never been against the alleged acts, rather they are kind of *tu quoque* arguments. That said, selectivity has usually been there in the enforcement of international criminal justice. See generally Cryer 2005; Werle and Vormbaum 2014, pp. 1–3; Maungandze and du Plessis 2015, pp. 65–82.

³ See Werle et al. 2014.

⁴ Persico 1994, p. 83; Newton 2001, p. 26. See also Minear 1971.

⁵ The New Yorker 1995. See also the New York Times 1994.

an appropriate measure. The fact that the other perpetrators of crimes during the *Derg* reign were not brought to justice does not warrant a conclusion that *Derg* officials as well should have been spared. As the proverb goes ‘half a loaf is better than none.’ In addition, the fact that the Red Terror trials can be considered as a manifestation of victor’s justice cannot by and of itself implicate the unfairness of the trials, for those convicted had undoubtedly perpetrated serious crimes against civilians. Moreover, an attempt was made to conduct the trials in a manner that respected the fair trial rights of the accused. For the most part, it is irrefutable that Mengistu and his collaborators committed egregious crimes and can, therefore, not be regarded as victims of the accountability process. Nonetheless, placing a narrow construction on the description of perpetrators should have been avoided, the reason for this being crimes allegedly perpetrated by other groups, including members of the current government, should also have been included within the mandate of the SPP and they, too, should have been investigated and prosecuted.

6.1.2 Trial in Absentia: Criminal Proceedings in the Absence of the Accused in the Dock

As stated in the previous chapter, a significant number of *Derg* officials fled the country when the rebels assumed power, with the result that 1,308 of the accused were tried and sentenced *in absentia*. Many of them, including the alpha male former President Mengistu, Hadis Tedla and Berhanu Bayeh, who were tried *in absentia* remain fugitives from justice. The trial *in absentia* and the non-enforcement of the *in absentia* sentences can be considered to be the downside of the Red Terror trials.

Both under Ethiopian and international laws, the accused person has the right to appear before a court of law and to defend himself the charges laid against him. In other words, the accused has the right to be present during the trial and appellate proceedings.⁶ As specifically set out under the procedural law of Ethiopia, in

⁶ Article 20 of the FDRE Constitution; Article 14(3)(d) of the ICCPR. See also Article 10 of UDHR, Article 6 of the ECHR; and Article 7 of ACHPR. The Banjul Charter does not state the right to be tried in presence explicitly. It can however be argued that it is encompassed under the rights stated in Article 7. The African Commission on Human and People’s Rights issued a guideline and clearly stated the accused person’s right to be tried in his presence. The relevant paragraph reads that: ‘In criminal proceedings, the accused has the right to be tried in his or her presence. (i) The accused has the right to appear in person before the judicial body. (ii) The accused may not be tried in absentia. If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge. (iii) The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.’ The African Commission 2003, para O, 6 (c).

principle, the accused person should be present during the trial.⁷ If the accused, after having been effectively notified about the impending proceedings, fails to appear in court on the date fixed for the trial, the court has to issue an arrest warrant for the accused to be arrested and brought before the court.⁸ If the arrest warrant is not executable, the trial will take place in his absence. It bears noting that a trial *in absentia* is categorized as a special form of procedure, unlike the ordinary trials where the accused is present. The law sets out conditions for a trial *in absentia*, which is not for all categories of accused and crimes. For instance, it is inapplicable for petty crimes and young offenders.⁹

Since *Derg* officials were charged with serious crimes, they could be tried *in absentia* provided that they were notified timeously and effectively of the impending court proceedings. As outlined above, the officials, including former President Mengistu, had fled the country and found refuge in foreign host countries. It can be argued that they forfeited the exercise of their right to appear and defend the charges laid against them. Simply put, the fugitives who were successfully traced have been deliberately trying to evade justice. Hence, the *in absentia* trial and conviction of non-attending accused persons is not only provided for under Ethiopia's laws of criminal procedural but serves the interests of both justice and victims.

Under international human rights instruments, trial *in absentia* is not absolutely prohibited. In the absence of the accused from the dock, the international norms permit a trial *in absentia* if the accused has received prior proper notification of the trial. Although the ICC Statute prohibits trial *in absentia*,¹⁰ the constitutive acts of

⁷ The Code stated that 'the accused shall appear personally to be informed of the charge and to defend himself. When he is assisted by an advocate the advocate shall appear with him.' Article 127(1) of the Criminal Procedure Code of 1961.

⁸ Article 160 of the Criminal Procedure Code of 1961.

⁹ Articles 161–162 of the Criminal Procedure Code of 1961.

¹⁰ Articles 63(1) and 67(1) (d) of the Rome Statute. Trial *in absentia* is prohibited unless the ICC orders the removal of the accused due to his continued disruption of the proceeding. During the drafting of the Rome Statute, there was a debate about whether or not trial *in absentia* be included in the ICC Statute. For further discussion of this, see Cassese 2013, pp. 357–361; Behrens 1998, pp. 113–125; Calvo-Goller 2009, pp. 228 *et seq.*; Cryer et al. 2010, pp. 469–470; Shaw 2012, pp. 107–140; Brown 1999, p. 763; Zakerhossein And De Brouwer 2015, pp. 181–224; Schabas 2009, pp. 335–380; Schabas 2011, pp. 304–307; Friman 1999, pp. 254–262. Article 20 of the ICTR Statute, Article 21(4) of the ICTY Statute did not expressly prohibit trial *in absentia*. Based on the Tribunal's jurisprudence, trial *in absentia* seems to be warranted in exceptional cases, see ICTY, *Prosecutor v Delalic*, Case No. IT-96-21-A, (1997), para 8967–897; ICTY, *Prosecutor v Blaskic*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, Case No. IT-95-14-AR, (1997), para 59; and ICTR, *Prosecutor v Barayagwiza*, Decision on Defense Motion to Withdraw, ICTR, Case No. 97-19-T (2002), para 6. Same wording or approach is transposed to Article 17 of the Statute of SCSL; Article 5 of the Special Panel for East Timor Regulations 200/30 as amended by Regulation 2001/25; Article 35 of the ECCC. Before these Courts, except in a very exceptional circumstance, such as, repeated disruption of proceeding by the accused, trial *in absentia* was prohibited.

prior international judicial bodies countenanced trial in absentia and indeed conducted such trials.¹¹

Needless to say, where the trial takes place in the presence of the accused, as opposed to where he is absent, the accused is placed in a less disadvantaged position. The rationale underlying the accused's fundamental right to be present at his trial is that he is given an opportunity to dispute the charges against him and to cross-examine state witnesses. Over and above this, he is able to show and express remorse when he is found guilty, and the court can take note of his repentance.

For these reasons, an *in absentia* trial should, therefore, be conducted only when necessary and on the basis that strict procedural safeguards are put in place that compensate the disadvantage of an *in absentia* trial. If a person accused of serious crimes fails to appear before the court despite being duly notified, conducting trial *in absentia* is desirable and has symbolic importance for the victims. Here it bears noting that under Ethiopian law an accused person who is being tried *in absentia* has the same rights as an accused who is present at the trial. For example, the ordinary criminal procedure applies; the accused has the right to be represented by counsel, and has the right to appeal against his conviction and sentence. Apart from this, there is a procedure to set aside a judgment handed down *in absentia*, which, in turn, can result in a plausible retrial or redetermination of the merits of the case. In order for a retrial to take place, an accused who has been tried and convicted *in absentia* must furnish the court with valid reasons for his absence. In other words, there is no automatic retrial under Ethiopian law. Hence, to regard trial *in absentia* as a drawback *per se* is not compellingly convincing, as trial *in absentia* is not only legitimate, but also does not violate an accused person's right to be present. In general, the trial *in absentia* of a significant number of *Derg* officials was not only necessary but also lawful. Some who were tried and convicted *in absentia* have been extradited and have served their prison terms.¹² Some applied for the setting

¹¹ The Statute of the Nuremberg Tribunal permitted trial *in absentia*. The relevant provision read that '[t]he Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.' Article 12 of the IMT Charter. It was on this basis that Martin Bormann was tried *in absentia* at Nuremberg, but later his death was established. Article 22 of the Statute of SCL and its Rules 104–109 explicitly permit trial *in absentia*.

¹² In 2006, Kelebesa Negawo, who was convicted of multiple murders in May 2002, was extradited from the US to serve his life term sentence, see Trial Watch <http://www.trial-ch.org/en/resources/trial-watch/trial-watch/profiles/profile/669/action/show/controller/> Profile.html. Accessed 20 September 2016. International crimes data, Cases, *Abebe-Jira v Negewobase* <http://www.internationalcrimesdatabase.org/Case/903/Abebe-Jira-v-Negewol>. Accessed 20 September 2016.

aside of the judgments delivered in their absence. Some *in absentia* decisions were in fact set aside,¹³ while some of the applications for retrials were dismissed.¹⁴

Although holding trial *in absentia* might cast doubt on the fairness of the process and thereby complicate the execution of the sentence, a trial *in absentia*, which had been conducted in accordance with the procedural safeguards, does not in and of itself jeopardize or contravene fair trial rights. Hence, accused persons who have deliberately absconded and chosen not to stand trial, as many *Derg* officials did, to avoid justice, should not be an impediment that thwarts the administration of justice. The reason is that the public interest, and particularly the interest of the victims, necessitates a trial *in absentia*. Otherwise, 'the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to the dispersal of the evidence, the expiry of the time limit for prosecution or miscarriage of justice.'¹⁵ Had there been no *in absentia* trials of *Derg* officials, including Mengistu, who deliberately sought to avoid justice, this would have been tantamount to making a mockery of international criminal justice.

However, the problem with Ethiopian law in this regard is that, if the accused is arrested and brought before the court, or if he submits himself voluntarily, he has no automatic right to a fresh retrial. The fact of the matter is that, for an *in absentia* judgment to be set aside, the accused must show that he received no proper

¹³ The Amhara Regional State Supreme Court, *SPP v Sileshi Tessema et al* Decision on Application to Set aside in *Absentia* Judgment, Criminal File No. 6/ 1997. In this application, the Court examined the SPP's and applicant's arguments. The applicant via his lawyer stated that he was not sufficiently notified about the impending proceedings. He was not duly notified at his address or at his workplace. Hence, he requested the Court to set aside the *in absentia* judgment. The SPP responded by objecting that the applicant should personally appear and lodge the application since application via his lawyers for setting aside in *absentia* judgment is not acceptable. The SPP alternatively argued that the applicant was duly notified. His summon to appear was published in the Addis Zemen newspaper. The Court in its analysis and holding stated that there is no legal prohibition against lodging the application to set aside an *in absentia* judgment via one's lawyer. Since the applicant is in prison, it is legally permissible for him to apply via his lawyer. The Court then proceeded that the applicant was not sufficiently traced and notified. Hence, decided by majority for retrial.

¹⁴ The Tigray Regional State Supreme Court, *SPP v Yerga Gebre-Hiwot et al*, Criminal File No. 5/ 2003. Yerga was charged in *absentia* with 18 other accused, see Tigray Supreme Court, *SPP v Yerga Gebre-Hiwot et al*, the SPP Charge Criminal File No. 231/93. He was found guilty of the crime of genocide (killing nine people and causing bodily injury to two); and sentenced to 18 years imprisonment. The Federal Supreme Court upheld his sentence. He applied for a fresh trial but the Court rejected his application by stating that there is no ground for setting aside the *in absentia* judgment. Federal Supreme Court, *Yerga Gebre Hiwot v the SPP*, Criminal File No. 17678/2005. Similarly, three individuals, who were convicted and sentenced in *absentia* by the Amhara Regional State Supreme Court, applied for a fresh trial. However, the Court rejected their application by stating that the time for lodging the application to set aside the *in absentia* decision had elapsed, see the Amhara Regional State Supreme Court, *The SPP v Sileshi Tessema et al* Decision on Application to Set aside in *Absentia* Judgment, Criminal File No. 6/ 1997.

¹⁵ ECtHR, *Colozza v Italy*, Series A No 89, (1985), para 29.

notification or that he was prevented from appearing because of *force majeure*. These are very stringent conditions to meet.

6.1.3 *The Use of Capital Punishment*

In the Red Terror trials, 51 accused were sentenced to death—the courts handed down 51 death penalties.¹⁶ The first person to be condemned to death was Getachew Terba.¹⁷ The death sentences elicited censure from abolitionist countries and human rights organizations alike. The accused, too, rejected the death sentences.¹⁸

In the Nuremberg and Tokyo Charters, the death penalty was recognized as one form of punishment. Both the Nuremberg and Tokyo tribunals handed down 19 death sentences.¹⁹ However, in the period after the Nuremberg and Tokyo trials, the death penalty came to be detested in the light of the gradual advent and recognition of a human rights culture internationally. It is true that Bills of Rights,²⁰ the

¹⁶ The Nuremberg and Tokyo Tribunals had produced 12 and seven death sentences, respectively. The Charters of the respective Tribunals gave the power to do so, see Article 27 of the Nuremberg Charter, Article 16 of the Tokyo Charter.

¹⁷ Amnesty International 1999. See also Trial International. <https://trialinternational.org/latest-post/getachew-terba/>. Accessed June 2016, Aneme 2006, p. 80

¹⁸ Amnesty International called the government to rule out the use of the death penalty. Later expressed its dismay on the imposition of death sentences.

¹⁹ The International Military Tribunal at Nuremberg, *United States et al v Hermann Wilhelm Göring et al* in Trial of the Major War Criminals, 14 November 1945; and The International Military Tribunal for the Far East, *RoLing, B. V. A., & RuTer, C. F.* Judgment, Judgment Of 4 November 1948.

²⁰ Article 6 of ICCPR. ‘In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.’ Article 6(2) of the ICC. The Human Rights Committee in its comment on the provision stated as follows: ‘States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”.’ The Human Rights Committee 1982, para 6. See also Article 3 of UDHR. UNGA adopted a Resolution which calls for a moratorium on the use of the death penalty, see UN General Assembly 2007.

ECHR,²¹ and the Banjul Charter²² do not expressly outlaw capital punishment; what they do is to restrict its use. The Second Optional Protocol to the ICCPR prohibits the imposition of the death penalty by states parties.²³ Protocol No. 13 to the ECHR prohibits the death penalty both in times of peace and war.²⁴ There has been a broadening international consensus and trend in favor of abolishing the death penalty. Hence, in the ICTY,²⁵ ICTR,²⁶ and recently the ICC,²⁷ the prescribed penalty is a term of imprisonment, not the death sentence.

By the end of 2015, 102 countries had abolished the death penalty.²⁸ However, Ethiopia remains one of the retentionist countries. The Ethiopian Constitution states that: 'Every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law.'²⁹ Thus, capital punishment has a constitutional basis under Ethiopian law.

The Ethiopian Penal Code recognized the death penalty as one form of punishment. In other words, the law in force at the time when the *Derg* officials committed the heinous crimes stated that '[t]he sentence of death shall not be passed except in the cases specifically laid down by the law as a punishment for offences which are completed and in the absence of any extenuating grounds.'³⁰ The new Criminal Code added another condition that needs to be met before the death penalty may be imposed, namely, that the death penalty may be imposed only for the commission of grave crimes and where the criminal is exceptionally

²¹ Article 2 of the European Convention on Human Rights 1950.

²² 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' Article 4 of the Banjul Charter 1982. The African Commission on Human and Peoples' Rights adopted the draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa in April 2015. It is tabled to the AU for adoption. See the Commission's communiqué http://www.achpr.org/files/sessions/56th/info/communiqu56/56thos_final_communique_en.pdf. Accessed 1 June 2016.

²³ The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty UN General Assembly Resolution 44/128 of 15 December 1989. It states that: 'No one within the jurisdiction of a State Party to the present Protocol shall be executed.' Article 1 of the Second Optional Protocol. For the status of the Optional Protocol see UN Treaty Collections https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en. Accessed 1 June 2016. Many states including Italy have ratified the Second Optional Protocol.

²⁴ 'The death penalty shall be abolished. No one shall be condemned to such penalty or executed', Article 1 of Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances (2002).

²⁵ Article 24 of the ICTY Statute.

²⁶ Article 23 of the ICTR Statute.

²⁷ Article 78 of the Rome Statute.

²⁸ See Amnesty International 2016 available at <https://www.amnesty.org/en/what-we-do/death-penalty/>. Accessed 15 December 2016.

²⁹ Article 15 of the FDRE Constitution.

³⁰ Article 116(1) of the Penal Code of 1957.

dangerous.³¹ In addition, the accused should be over the age of 18 at the time of the commission of the crime. These conditions meet the standards set in international instruments to which Ethiopia has acceded.³²

The courts have the power to impose the death penalty when the conditions are met, otherwise, this would violate the accused's right to life. As noted above, a death sentence passed by a court may be executed only if the President endorses it.

In the *Mengistu et al* case, the Federal Supreme Court reasoned that all the conditions for imposing the death penalty were met, hence imposing the death penalty was warranted under the law. In other words, it stated that the Federal High Court erred by not imposing the death penalty on the accused, the sentences of whom the SPP had appealed.³³ Hence, including the 18 accused on whom the Appellate Court imposed death sentences, a total of 51 accused were sentenced to death in the Red Terror trials.

Legally speaking, the imposition of the death penalty on *Derg* officials is neither in contravention of Ethiopian law nor of its international commitments. Although the death penalty is becoming a less acceptable form of punishment, Ethiopia has not acceded to the Second Optional Protocol of the ICCPR. Hence, as things stand, it has no legal obligation to refrain from using the death penalty as a punishment. Thus the imposition and/or execution of death penalties do not violate its obligations under any of the international instruments.

The problem with imposing capital punishment, especially when significant numbers of convicted persons remain at large, is how such a sentence can be enforced. Imposing the death sentence is perhaps like giving countries where the accused found refuge an excuse not to extradite them. For instance, the reason for Italy's refusal to surrender the two *Derg* officials, who have found refuge in the Italian Embassy in Addis Ababa for over 25 years, is that they had received the death penalty. The Italian government has repeatedly stated that it is against Italy's international commitments to surrender the fugitives to a country where they will be executed or where they face the real risk of capital punishment.³⁴

Abolitionist countries are required to refrain from complicity in the imposition of the death penalty by not extraditing accused persons to a country where there is a real risk of facing the death penalty.³⁵ In other words, abolitionist countries, like

³¹ Article 117 of the Criminal Code. This condition is introduced to meet the international standards for imposition of the death penalty.

³² Article 6(2) of the ICCPR.

³³ *Supra* Sect. 5.4.

³⁴ *Supra* Sect. 4.4.

³⁵ The UN HRC opined that: 'For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.' UN HRC, *Roger Judge v Canada*, UN HRC, Communication No. 829/1998, UN Doc. CCPR/C/78/D/829/1998 (2003), para 10.4. See also European Court of Human Rights, *AL-Saadoon and Mufdhi v the United Kingdom*, Judgment (2 March 2010), para 115–145;

Italy, have an obligation not to extradite (or expose) an accused person to a country where he would face a real risk of death. Similarly, extraditing or deporting a person to a country where he is under a death sentence, without seeking assurances that the death penalty would not be carried out, is a violation of the person's right to life.³⁶ Accordingly, Italy has refused to extradite of the two convicted persons. It is not clear if the Italian government has indeed sought, and failed to secure, the assurances from the Ethiopian government that the death sentences would not be carried out. Here, as will be shown below, it can be argued that the accused may not face a real risk of death, despite their being in death row confinement.

Based on Ethiopia's record, most of the death sentences have not been carried out. Although the courts sentence individuals to death, the punishment has rarely been carried out. Since 1991, only two individuals, who were sentenced to death for fatally shooting high-ranking government or military officials, have been

European Court of Human Rights, *Jean MV Hakizimana v Sweden*, Decision as to the Admissibility on Application No. 37913/05 (27 March 2008); UN HRC, *Chitat Ng v Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), para 13.1. 15; and European Court of Human Rights, *Soering v The United Kingdom*, Judgment, 07 July 1989, para 69–111. In its previous decision the Committee stated that 'it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts per se to a violation of article 6 of the Covenant.' UN HRC, *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), para 14.1–14.6 and UN HRC, *Roger Judge v Canada*, (2003), para 10.2. In explaining the reason for its shift of position the Committee stated that: 'While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights—the right to life—and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favor of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving state, in the case of *United States v. Burns*. There, the Supreme Court of Canada held that the government must seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgment, "Other abolitionist countries do not, in general, extradite without assurances." (36) The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.' *Roger Judge v Canada*, UN HRC (2003), para 10.3.

³⁶ Before removing the person under a death sentence to the requesting country, the deporting country has to ensure that the death sentence would not be enforced. On this see *Roger Judge v Canada*, UN HRC (2003), para 10.6–10.7.

executed.³⁷ Many of the death sentences have not received the nod from the President. Similarly, the death sentences imposed on *Derg* officials were not carried out because, as stated above, the Head of Government has commuted the death sentences to sentences of life imprisonment.³⁸ However, the commutation applies only in respect of those who had been serving their prison terms, which means that former President Mengistu, the two convicted persons in the Italian Embassy, and other fugitives did not benefit from the commutation. The Italian government is therefore still legally obligated not to surrender the two fugitives. In other words, the death sentence remains as a stumbling block for the execution of the judgment.

There seems to be a sort of moratorium on the enforcement of the death sentence in Ethiopia. This means that, as regards the two individuals in the Italian Embassy, the Ethiopian executive authority should have done something more to get hold of them. Since commutation is an act of the Executive, the government could assure the Italian authorities that the two individuals would not be executed if extradited. There is no reason to enforce the death penalty against them as they were not the most responsible criminals, compared to those whose death penalties were commuted. If such guarantee were given to the Italian authorities, they would not have a legitimate ground not to extradite the two criminals. The crimes for which the two had been convicted and sentenced are serious international crimes; hence, grounds like double criminality could not be successfully raised for not extraditing them. Even if the officials were to have been convicted of crimes characterized as politicide and for other crimes, these crimes bear the mark of torture and of crimes against humanity. Hence, countries, including Italy, have a duty to prosecute or extradite the perpetrators of such crimes based on treaty laws and customary international law.³⁹

With regard to executing the sentence imposed on former President Mengistu, the death sentence is apparently not the main reason for not extraditing him. Zimbabwe is a retentionist country.⁴⁰ Therefore, unlike in the case of Italy, the death sentence is not a stumbling block in Mengistu's case. The absence of an extradition agreement between the two countries as well as the political unwillingness on the part of Zimbabwe has thus far helped Mengistu to avoid accountability for his criminal past. The Mugabe government has repeatedly stated that Mengistu will not be extradited because of the assistance he provided to the

³⁷ Since 1991, there have only been two death sentences that received the approval of the President and were thereafter carried out. In 1998 an Eritrean businessman who was convicted and sentenced to death for shooting an Ethiopian general was executed. After a decade, Major Tsehai Wolde Selassie who was convicted of shooting dead Kinfe Gebremedhin (former head of security and immigration) was executed. Since then most death sentences have been commuted to life imprisonment. See Reuters 2007. See also Amnesty International 2015, p. 56; Milkias 2011, p. 419.

³⁸ See supra Sect. 5.4.

³⁹ Italy ratified the Torture Convention in 1989.

⁴⁰ Article 48 of Zimbabwe Constitution 2013; Zimbabwe 1927, Chap. 9:07, Articles 337–342; Amnesty International 2015, p. 65.

guerrilla forces during Zimbabwe's liberation struggle. Mengistu is therefore regarded by Mugabe as a friend of Zimbabwe.⁴¹ Based on treaty law it is hardly plausible to argue that Zimbabwe has a duty to prosecute or extradite Mengistu. Zimbabwe has not ratified the conventions that deal with the crimes perpetrated by the Mengistu regime. For instance, Zimbabwe is not a signatory to the Torture Convention.⁴² Admittedly, it has ratified the Genocide Convention;⁴³ however, the Act, which domesticated the Convention, came into force in 2000. Even if it came into force earlier, it would not have helped. Zimbabwe domesticated the Convention verbatim; which means that the crimes committed by the Mengistu regime do not fall under the definition of genocide. However, the fact that Zimbabwe is not a signatory to the treaties which impose an *aut dedere aut judicare* obligation, and the fact that there is no extradition treaty between the host and requesting countries do not give a country the right to host perpetrators of core crimes. The crimes committed by the Mengistu regime and Mengistu personally fall squarely within the realm of crimes against humanity and torture, which are widely accepted as core crimes. Hence, even if a country is not a signatory to the treaties which criminalized such crimes, it has an obligation to prosecute or extradite. It can be argued that, based on customary international law, Zimbabwe has an obligation to prosecute or extradite Mengistu. Nevertheless, for as long as the Mugabe government continues to rule Zimbabwe, there is no glimmer of hope that Mengistu will be extradited.

An option less resorted to is that of using different diplomatic channels, including the AU,⁴⁴ to put pressure on Zimbabwe. The Mengistu crimes should have been brought to the attention of the international community so that those

⁴¹ There is no extradition agreement between Ethiopia and Zimbabwe. Ethiopia has extradition agreements only with few countries—Djibouti and Sudan. There is no clear (official) information on the number of extradition requests that Ethiopia has submitted to the Zimbabwean authority. Zimbabwe's opposition declared that they would extradite Mengistu if they win the election; see Reuters 2006.

⁴² See UN Treaty Collection, Status of Ratification of Torture Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=treaty&mtdsg_no=iv-9&chapter=4&lang=en. Accessed 13 June 2016. Ethiopia acceded to this Convention in 1994. Zimbabwe has not acceded to the International Convention for the Protection of All Persons from Enforced Disappearance United Nations, Treaty Series, vol. 2716, Doc.A/61/448, p. 3 (2006). Nor Ethiopia did accede to this Convention.

⁴³ Acceded on 13 May 1991, UN Treaty Collection, Status of Ratification of Genocide Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en. Accessed 17 June 2016. Implemented the Convention by Genocide Act, Chapter 9: 20, Act 9/2000. It came into force on 16th June 2000.

⁴⁴ After a legal wrangle with Belgium, in the Hissene Hibre case, Senegal referred the matter to the AU for a decision on how to prosecute him. The AU then, on the basis of a recommendation of eminent jurists that it had established, instructed Senegal to try Hibre 'on behalf of Africa'. The Extraordinary Chambers within the Court of Senegal was established to deal with the Hibre crimes. It is perhaps the first hybrid court established by a regional organization. In establishing a court to try Hibre, the AU stated its duty to fight impunity. In a similar fashion, if the Mengistu case was brought to the full attention of the AU, the Assembly would arguably be obliged to follow its precedent and find a way on how to bring Mengistu to book.

states which have an extradition agreement with Zimbabwe can ask for Mengistu's extradition and then bring him to book by exercising universal jurisdiction. Furthermore, Ethiopia should have considered initiating the matter before the ICJ, as Belgium did against Senegal in the case of Hissen Habre.⁴⁵ It has to be noted that unlike Senegal, which lodged a unilateral declaration accepting the ICJ's jurisdiction,⁴⁶ Zimbabwe has not followed suit. This means that, as things stand, the ICJ has no jurisdiction over Zimbabwe. However, there is a very unlikely possibility that Zimbabwe may accept the jurisdiction of the ICJ to enable it to entertain the matter—forum prorogatum.⁴⁷ The latter term is defined as 'the possibility that if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court.'⁴⁸ Accordingly, Zimbabwe may remedy the ICJ's jurisdiction as Albania and France did.⁴⁹ If Zimbabwe, as a would-be respondent state, decided not to remedy the non-existent jurisdiction of the ICJ, the Court would be obliged not to take any further steps.⁵⁰ This could still be regarded as something positive since the ICJ's decision not to take action would help to bring the Mengistu matter to the fore. However, if the Zimbabwean government, at least implicitly, consented to the ICJ's jurisdiction, Ethiopia can argue that Zimbabwe has violated its obligation under customary international law by not prosecuting or

⁴⁵ The ICJ, *Belgium v Senegal*, Questions relating to the Obligation to Prosecute or Extradite (2012).

⁴⁶ Article 36(2) of the ICJ Statute. For a list of countries that have lodged such declaration, see ICJ, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>. Accessed 17 June 2016.

⁴⁷ Article 38 of the ICJ Statute.

⁴⁸ The ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 13 September 1999, Separate opinion of Judge *ad hoc* Lauterpacht, para 24. The consent of the state need not be express, rather it can be implicitly inferred from the conducts of the state. On this, see generally, The ICJ, *Colombia v Peru*, *Haya de la Torre*, Judgment of 13 June 1951, I.C.J. Reports, 1951; and The ICJ, *United Kingdom v Iran*, *Anglo-Iranian Oil Co.*, Judgment (Preliminary Objections), 22 July 1952, Reports 1952, p. 114.

⁴⁹ The ICJ, *United Kingdom of Great Britain and Northern Ireland v Albania*, *Corfu Channel*, 1947–1948; and The ICJ, *Djibouti v. France*, *Certain Questions of Mutual Assistance in Criminal Matters*, Judgment, 4 June 2008.

⁵⁰ See the ICJ, *United States v Hungary* and *United States v. USSR*, 1954 I.C.J. Rep. 99 and 103, 3 March; The ICJ, *United States of America v Czechoslovakia Aerial Incident* of 10 March 1953, Order of March 10th, 1956, Reports 1956, 9; and The ICJ, *United Kingdom v Argentina and United Kingdom v Chile*, *Antarctica Aerial Incident* of 7 October 1952, Order of March 16th, 1956, ICJ Reports 1956.

extraditing Mengistu, who has been residing there as a political asylee for over two decades. Admittedly, Zimbabwe has not ratified the Torture Convention, unlike Senegal.⁵¹ However, the absence of laws on *ius cogens* crimes, such as, torture and

⁵¹ Here it has to be noted that the Torture Convention entered into force on 26 June 1987 pursuant to Article 27 of same. For Senegal it entered into force on 26 June 1987, whereas for Belgium on 25 June 1999 pursuant to Articles 26 and 27 of the Convention. The Court rightly pointed out that for purposes of the Convention torture means those acts committed after the entry into force of the Convention. Hence, the duty under the Convention applies to those acts allegedly committed after 26 June 1987—the temporal application of the Convention is limited to acts of torture that have happened after the date of its entry into force. The Court succinctly stated that ‘the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. ‘Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter, provides: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party.” The Court notes that nothing in the Convention against Torture reveals an intention to require a state party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, para 1, of the Convention does not apply to such acts’, *Belgium v Senegal*, ICJ, Judgment Questions relating to the Obligation to Prosecute or Extradite ICJ Rep 422 (2012), para 100. See also the Torture Committee analysis on the temporal application of the Convention where it stated that “‘torture” for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention’, *O. R. v Argentina*, Comm. 1/1988, 2/1988 and 3/1988, UN Doc., U.N. GAOR, 45th Sess., Supp. No. 44, U.N. Doc. A/45/44, Annex V, at 108 (May 4, 1990), para 7.5. However, this does not mean that the obligation does not exist outside the Convention. ‘In the Court’s [ICJ] opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*). That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; UN (1966) the International Covenant on Civil and Political Rights of 1966; General Assembly Resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.’ The ICJ also noted that ‘the Parties [Senegal and Belgium] agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention’, see *Belgium v Senegal*, ICJ, Judgment Questions relating to the Obligation to Prosecute or Extradite ICJ Rep 422 (2012), paras 97 and 99. Hence, it is accepted that torture is a *jus cogens* crimes. This view is also endorsed by the AU in its agreement which states the duty ‘[...] to prosecute those most responsible for crimes and serious violations of international law, international custom, and international conventions ratified by Chad and Senegal committed on the territory of Chad from 7 June 1982 to 01 December 1990.’ Article 1 of Agreement between the Government of the Republic of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System 2012. The Chamber is given the power to investigate and prosecute torture, genocide and crimes against humanity that had happened between June 1982 and 1 December 1990. That means torture that was committed before enter into force of the Torture Convention is included under the jurisdiction of the Chamber. This can only be justified by resorting to the *jus cogens* nature of the crime. Generally see Statute of the Extraordinary African Chambers; Fall 2014, pp. 117–132; Brody 2015, pp. 209–217; Williams 2013; pp. 1139–1160; Cimiotta 2015, pp. 177–197; Buys 2012;

crimes against humanity, could not be a hindrance to prosecuting or extraditing the perpetrator. In simple terms, Ethiopia can base its claim on the fact that Zimbabwe has violated its *erga omnes* obligation vis-à-vis the international community.

6.1.4 *Protracted Proceedings and Their Implication for Fair Trial Rights*

One of the legitimate and convincing criticisms mounted against the Red Terror trials concerns the protracted nature of the proceedings. Both the pre-trial process and the trials took an unreasonably long time to wind up, even in the contexts of a transitioning state that had experienced a total collapse of institutions and a judicial vacuum. The accused were detained from two to five years without being notified of the charges against them.⁵² They were left in limbo. After the charges were filed, the proceedings were conducted at an erratic pace and dragged on for years, for approximately 17 years in the case of *Mengistu et al.* Unsurprisingly, several accused died in the course of the protracted proceedings.

As noted in the previous chapters, the rebel groups arrested a significant number of *Derg* officials when they swept into power and controlled Addis Abeba. Many more were arrested subsequently. It took a long time to set up a functioning administration of justice—and this whilst the accused waited in custody without formal charges. This means that the accused remained in detention without any charges. When the SPP started its operation, some of the accused were released on bail or unconditionally on the SPP's own initiative or as a result of their *habeas corpus* petitions. The SPP filed its first charge in October 1994. The accused had lingered in detention since May 1991 without being informed of the reasons for their arrest.

Under both the ICCPR and the FDRE Constitution, it is enunciated that '[p]ersons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them.'⁵³ In its comment on the ICCPR, the HRC stated: 'More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a

Andenas and Weatherall 2013, pp. 753–769; Nollkaemper 2013, pp. 501–51; Van Steenberghe 2011, pp. 1089–1116; Nowak and McArthur 2008; the Committee against Torture, *Suleymane Guengueng et al v Senegal*, Communication No. 181/2001, UN Doc. CAT/C/36/D/181/2001, 2006; ECOWAS Court of Justice, *Hissène Habré v Senegal* ECW/CCJ/JUD/06/10, 18 November 2010.

⁵² See supra Sects. 4.3.1 and 4.4.

⁵³ Article 19(1) of FDRE Constitution and Article 9(2). African Commission on Human and Peoples' Rights, *Malawi African Association v Mauritania* Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para 112–113, where it interpreted Article 6 of the Banjul Charter to include the right to be informed of the language the defendant understands.

few days.’⁵⁴ The FDRE Constitution clarified how promptly prompt is by stating that an arrested person shall be brought before a court of law within 48 hours of his arrest.⁵⁵ In the Red Terror cases, all those who had been incarcerated since May 1991 were informed of the reasons for their detention only after at least two years. Clearly, they were not notified of the charges against them in due time. Admittedly, the situation of the transition, coupled with other factors, made it a tall order to meet the criminal justice standards, which are designed to be in keeping with the legal ethos of a state with a functioning criminal justice apparatus rather than one bereft of a machinery of justice and denuded of key personnel.

Even after the SPP notified the detainees of reasons for their arrest—charges laid against them—in most cases the proceedings dragged on. For instance, in respect of the prime case of the *Mengistu et al* case, the charge was filed in October 1994, and the verdict handed down 12 years later, in December 2006; and the Appellate Court handed down its decision in 2008. That means that the *Mengistu et al* case took 17 years, from the time of detention of the accused to appeal, before the justice system finally disposed of the case. This was not only the main and first case filed but also the longest Red Terror trial. Other Red Terror trials, like the one of *Melaku Tefera et al*, took 11 years to wind to an end. This does not mean that there were no Red Terror trials that were concluded within a relatively shorter time. However, in many of the Red Terror trials the trial lasted for a long time. In some cases, the accused were released immediately after conviction since they had been in prison for periods equal to or longer than the prison terms imposed on them.⁵⁶

It is stated unequivocally that an accused person has the right to be tried within a reasonable time.⁵⁷ Some of the Red Terror trials were long drawn-out affairs, which upset components of the fair trial rights—for instance, the right to a speedy trial. The SPP’s rejoinder to the criticisms of the tardiness of the proceedings was that elsewhere, despite an extensive infrastructure and international support, court processes proved to be equally sluggish.⁵⁸ In the words of the SPP it ‘took time elsewhere’, too.⁵⁹ It is true that trials of international crimes have taken time elsewhere. Recently, the ICC, which obviously is well-resourced compared to the courts in many states, let alone a country like Ethiopia, took close to a decade to

⁵⁴ Human Rights Committee 1994, para 2.

⁵⁵ ‘Persons arrested have the right to be brought before a court within 48 hours of their arrest. Such time shall not include the time reasonably required for the journey from the place of arrest to the court. On appearing before a court, they have the right to be given prompt and specific explanation of the reasons for their arrest due to the alleged crime committed.’ Article 19(3) of the FDRE Constitution.

⁵⁶ The Federal High Court, *SPP v Dr. Geremew Debal*, Criminal File, 952/1997. Found guilty and sentenced to 8 years. He was released immediately as he had already spent time in prison.

⁵⁷ Article 9(3) of the ICCPR. See also Article 19(4) of the FDRE Constitution, which recognizes the right to a speedy trial. The Banjul Charter also states that an accused has ‘the right to be tried within a reasonable time by an impartial court or tribunal’ Article 7(d) of the Charter.

⁵⁸ SPP Report 1994, pp. 5–9.

⁵⁹ SPP Report 1994, p. 5.

finalize the proceedings against the first accused, Thomas Lubanga.⁶⁰ This shows that investigating and prosecuting international crimes is a complex and daunting task, even for relatively well-equipped institutions. However, the point is whether the undue delay in the Red Terror trials can be justified on the basis of the limited resources and circumstances of the transition.

The protracted nature of the proceedings in the Red Terror cases can be attributed to multifaceted factors. These include: First, the barriers caused by limited resources or a paucity of infrastructure. The Transitional Government inherited empty public coffer and a country devastated by 17 years of war. There were limited resources, including properly trained and qualified personnel, to bring the large numbers of perpetrators to justice. The SPP had initially attracted public interest and international support, but as time went by the support started dwindling and waned away in some cases. Secondly, the joinder of a large number of accused contributed to the delay. In many of the Red Terror trials, the SPP charged several accused jointly. In some cases, the number of co-accused was as high as 200.⁶¹ Normally, joinder of accused accelerates the proceedings, but charging a large number of accused together can also complicate matters and create a delay of proceeding, especially when only few of the accused are charged with most of the counts. In the *Mengistu et al* case, the SPP jointly charged 106 accused.⁶² Of these, only the first 12 accused were charged with all the counts.⁶³ In other words, most of the accused in the main Red Terror case were not charged with most of the counts. It would have been more appropriate and expeditious had the SPP jointly charged the first 12 accused. The Court should have rectified the position by ordering the severance of the charges against the 12. Thirdly, calling a large number of prosecution witnesses was another factor that caused the slow progress of the trials. The SPP originally intended to call over 16,000 witnesses; however, it managed to adduce only half the number in the end. Had the SPP presented all the interviewed and identified prosecution witnesses the proceedings would have dragged on for even longer. For instance, in the *Mengistu et al* case over 2,000 witnesses were listed for appearance, whereas just over 700 actually testified. In another Red Terror case, 1,471 witnesses were scheduled to testify.⁶⁴

In most cases, the testimonies of many of the witnesses were the same and not that relevant to proving the allegations made by the prosecutor. The number of

⁶⁰ ICC Trial Chamber II, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06.

⁶¹ The Federal High Court, *SPP v Kasaye Aragaw et al* Criminal File No. 923/97. In this case, at the beginning, about 200 accused were jointly charged.

⁶² See also the Federal High Court, *SPP v Gesgis Gebre-Meske et al*, Criminal File No., 939/97; and the Federal High Court *SPP v Debala Dinsa*, FHC, Criminal File NO. 912/97.

⁶³ Supra Sect. 5.4.1.

⁶⁴ Federal High Court, the *SPP v Debela Dinsa et al*, Criminal File No. 912/97.

witnesses should have been limited to the most indispensable ones who could testify specifically about the alleged acts, than give a narration of the general events pertaining to the human rights violations. Although the SPP tendered a large number of witnesses, what in fact helped the SPP to prove its case successfully were documents that the accused had produced themselves, in other words, were of their own making. Notwithstanding the existence of such documentary evidence, the reason why the SPP failed to curtail the number of witnesses to a minimum, rather than flooding the Court with a large number of witnesses, was arguably that it sought to fulfil its second mandate—establishing a historical record of the violations. Taking exception to the multitude of prosecution witnesses called to testify, one defense counsel declared that if what the SPP was bent on was record keeping, this could have been done more effectively by a truth commission; and this could (and need) not be done in a courtroom.⁶⁵ Fourthly, the widespread nature of the crimes and the swarm of perpetrators also contributed to the delay. The scale of the alleged crimes and the legion of accused in custody were, realistically, almost an insuperable hurdle for the SPP to overcome. Plainly speaking, the SPP was simply overtasked. However, this by itself does not justify the prolongation of the trials. In fact, had the SPP concentrated on only the most responsible accused persons, instead of pursuing doggedly the cases of over 5,000 former *Derg* officials, it would have contributed hugely to expediting the finalization of the cases. The peculiar constraints that beset a country emerging from a state of protracted lawlessness necessitate some exceptions to be made, if only to impart a semblance of legal credibility to the judicial process. Otherwise, a case for extensive prosecution might not be credible and effective in a scenario where there are a large number of perpetrators and a wholesale collapse of the judicial process. Prosecuting all the suspects in a manner that meets fair trial standards would be near impossible, even for a state with a well-functioning judiciary, let alone a transitioning state. With the broken-down state and feeble justice machinery it inherited from the violent Mengistu regime, the Transitional Government, and the SPP, should not have investigated and prosecuted the small fish. Furthermore, there should have been a division of labor rather than an overstraining of the SPP with mightily daunting tasks—prosecution and establishing historical record. Failure to do so resulted in a long period of pre-trial detention without charge and protracted court proceedings, which made the entire criminal justice process very challenging and problematic. However, those problems cannot warrant a suggestion for a total disregard of the Red Terror trials as a state practice on the prosecution of political genocide.

⁶⁵ Kidane 2002, p. 688.

6.1.5 *Genocide or Not Debate: Did the Mengistu Regime Commit Genocide?*

Derg officials, former members of Ethiopia's House of People's Representatives and writers⁶⁶ are of the view that the crimes committed by *Derg* officials should not have been regarded as genocide.⁶⁷ Although they did not deny the killings, the infliction of torture and other atrocious crimes, they contested the characterization of such acts as genocide. Their argument is based mainly on the fact that no ethnic, race or tribal group was targeted by the *Derg* regime. Their contention is that the decimation of political groups should not be regarded as genocide, as the Genocide Convention does not make provision for this phenomenon. Kissi has argued in particular that while the killings in Cambodia constituted genocide, such a label does not befit the acts committed during the Ethiopian Red Terror.⁶⁸ In his words:

Had the Dergue destroyed a defenceless or inactive group of people who only held political views different from the Dergue's, and had the revolutionary, military regime broadened the killing of its political opponents to include members of their family and the ethnic groups from which those political opponents came, the Dergue would be guilty of genocide. But the empirical evidence indicates that that is not what happened. The Dergue committed crimes against humanity including politicide, and not genocide as strictly defined in the UN Genocide Convention.⁶⁹

He further noted that 'the Ethiopian case presents a challenge to scholars of genocide studies because, in Ethiopian law, politicide is a form of genocide. The question is: which law should apply in determining and prosecuting the crime of genocide.'⁷⁰ Whilst Kissi acknowledges the broader definition of genocide under the Ethiopia's Penal Code,⁷¹ he is reluctant, however, to call it genocide even based on the law that the Court applied.⁷²

As set out above, the former President Mengistu and his collaborators were found guilty of perpetrating the crime of genocide—politicide. The Court convicted about 1,100 individuals for provoking the commission of genocide, committing

⁶⁶ Journalist Eskinder argued that 'Derg officials have been sentenced to death for the wrong reasons. Whatever the courts have said, they are not guilty of genocide.' Nega Ethiomedia, 1 January 2011 available at <http://ethiomedia.com/augur/4358.htm>. Accessed 20 June 2016. Likewise, Ryle argued that 'on the face of it, the genocide charge is seen as odd. The *Dergue* was undoubtedly responsible for terrible crimes, but it was not, in ordinary sense, guilty of genocide: it did not—at least not during the Red Terror [1976–1977] kill people on the grounds of race or creed.' The New Yorker 1995, p. 52. See also Kissi 2006, p. 111.

⁶⁷ Supra Sect. 5.3.1.7. See also Kissi 2006, pp. 131–132.

⁶⁸ Kissi 2006, pp. 129–130.

⁶⁹ Ibid., p. 129.

⁷⁰ Kissi 2006, p. 130.

⁷¹ Ibid., pp. 98, and 102.

⁷² Ibid., pp. 106 and 130.

and/or ordering the genocidal acts, as well as other crimes.⁷³ According to the finding of the Court, based on Ethiopian law, most of the acts perpetrated by *Derg* officials and their henchmen against the regime's opponents met the requirements of the crime of genocide. However, the Court did not hand down unanimous conviction judgments.⁷⁴ As pointed out above, in the *Mengistu et al* case, Judge Nuru Said disagreed with the finding on genocide, arguing that the accused should instead have been found guilty of aggravated homicide. The question to be posed then is: whether the conduct of the *Derg* officials complied with the elements of the crime of genocide under the law applied by the Court.

The argument of the critics mainly focused on the fact that genocidal acts against political groups could not be considered to be genocide. According to them, genocide is limited to genocidal acts committed against the four protected groups—religious, national, ethnic and racial. It is true that under the Genocide Convention and other subsequent instruments which mirrored it, genocide against political groups is not criminalized. However, from as far back as 1957, politicide, meaning liquidation of political groups, has been regarded as a form of genocide under Ethiopian law. Hence, there is no lack of a normative framework for the crime of politicide since then. The Court did not convict *Derg* officials of genocide against religious or ethnic groups.

It bears mentioning here that the Amharic version of the Penal Code, and also the new Criminal Code, used the term 'ዘርን ማጥፋት' (*zeren matefat*).⁷⁵ This literally means 'decimation of a racial group'. Although the meaning of the term genocide as coined by Lemkin has a similar meaning, *zeren matefat* is a conspicuous misnomer. The effect of the incongruous nature of the Amharic word for genocide, however, is not restricted to genocide against a political group. Based on the term *zere matefat* alone, the decimation of a religious or other group would not constitute genocide. Hence, as it is difficult to capture everything in the title of a provision, the clear wording of the content of the provision of the law, which criminalized genocide in a broader sense, should have been examined to determine the ambit of genocidal acts and protected groups.

The Penal Code criminalized genocide against political groups. Admittedly, as averred by the accused during the proceedings there, was, a difference between the authoritative Amharic version and its analogue English version. The Amharic

⁷³ Supra Sects. 5.4.1 and 5.3. See the Chief Prosecutor Girma Wakjira's Report to the Parliament, Part II at <http://www.ethiotube.net/video/8194/Documentary-finding-of-human-rights-abuses-during-Red-Terror-era-Part-2>. Accessed 20 June 2016.

⁷⁴ For discussion of the judgment, see supra Sect. 5.3.5.

⁷⁵ The Afaan Oromo counterpart of Article 269 of the Criminal Code employs the terms '*Sanyii Balleessuu*', which has understandably a congruent meaning to the Amharic version of the Code. See Kewwata 269 *Seera Yakkaa Rippaabiliika Dimokiraatawaa Federaalawaa Itoophiyaa* 1997 (Article 269 of the Criminal Code of the Federal Democratic Republic of Ethiopia 2004). In the opinion of the author, it is less of a misnomer if words like '*hahaa ita'alleessuu' ita'alleessuu' ita'alleessuu' ita'alleessuu'*' (*Kelekelä Yetederegeleten Buden Matekat Weyem Matefat*) are used. Or else, using the English word genocide *per se* would help to minimize the misleading effect of the title of the provision.

version did not use the term ‘political group’ *per se* but ‘በፖለቲካ ተሳሮ የተቆዋዋመን የህብረ ቤሄርን የሆነ አንድ ክፍል ህዝብ ...’⁷⁶ which can loosely be translated as ‘a politically unified multinational group.’ As the Court ruled, this wording of the Amharic version referred to genocide against political groups. In the author’s opinion, as the Court unmistakably decided, genocide against a political group was criminalized under the law which was passed a long time before the coming into power of the *Derg*. The disparity between the two versions is trivial.

What nevertheless needs to be addressed is whether or not the acts committed by *Derg* officials were, in fact, genocide against political groups. In other words, did the acts committed by the *Derg* fulfil the elements enshrined in the Penal Code for genocide against political groups? As the Court decided, the requirements were met, and hence convicted the officials of genocide against political groups. On the whole, the Court’s finding was appropriate. The commission of most of the alleged acts was not contested; instead, the issue was whether the accused acted with *dolus specialis*. The crimes committed by the *Derg* officials, especially those committed during the official Red Terror period, fall squarely within the semantic of genocide, specifically politicide. Although most of the acts perpetrated by *Derg* officials were proven beyond a reasonable doubt to be genocide against political groups, there were some acts which should not have been regarded as genocide against political groups. For instance in the *Mengistu et al* case, Count one of the second charge, namely the killing of 59 officials of the Haile Selassie regime, did not fulfil the special intent element. In other words, the SPP did not adequately show the link between the killing and the special intent to destroy them on account of their membership of the Haile Selassie administration. The *Derg* officials spared some of the imperial officials and their families. The killing was committed ostensibly because of the *Derg* members’ desire to consolidate their power rather than because of the political beliefs of the victims. Similarly, with regard to the killing of five individuals (Count two),⁷⁷ the killing of the Emperor (Count five), the killing of former *Derg* leaders or members, such as Atenafu Abate⁷⁸ and Teferi Benti,⁷⁹ and the killing of Patriarch Abune Teflosiwos,⁸⁰ the SPP did not adequately show that the victims were killed because of their political attitude or membership of certain political groups. Based on the evidence, it would be more precise to say that the

⁷⁶ Article 269 of the Penal Code.

⁷⁷ Here the killing of General Tadesse Biru was carried out because of his sympathy for the Oromo struggle movements. Hence, the political nexus was there.

⁷⁸ Count 10 of the *Mengistu et al* case.

⁷⁹ Count 38 of the *Mengistu et al* case. He and the other six were killed due to their conspiracy to overthrow the regime. The Federal Supreme Court, the *SPP v Mengistu et al*, Criminal File No. 30181 (2008), p. 73.

⁸⁰ Count 91 of the *Mengistu et al* case. The reason for the killing of the Patriarch is not sufficiently shown. See the Federal Supreme Court, the *SPP v Mengistu et al*, Criminal File No. 30181 (2008), p. 73. The killing of priest Gudina Tumas arguably complied with the intent to destroy political groups because his killing was orchestrated due to his allegiance to or sentiment for OLF. See Count 92 of the *Mengistu et al* case.

killings were seemingly orchestrated for non-political purposes. Simply put, the killings did not evince a physical expression of intent to extinguish (political) groups as such. They were instead arbitrary killings that were ignited by panic, and on obsession with clinging onto power or to consolidate power; but had the special intent been there the motive would not have mattered. Hence, in those cases, the Court should have convicted them on the alternative charge—aggravated homicide.

The Appellate Court also identified those irregularities. However, for one or other unconvincing reason it failed to re-characterize those counts to the alternative charge.⁸¹ In other words, the Appellate Court refrained from altering the conviction judgment of the Federal High Court in the *Mengistu et al* case. This means that on the charges one and two the accused were convicted of genocide, save for count six of the second charge. On the latter count, the accused were found guilty of aggravated homicide because the killing was carried out for non-political purposes.

Under Ethiopia's law, denying the commission of genocide, even after the final finding of a court, is inconsequential and not a crime.⁸² Such a denial might, however, have an impact on the convicted persons future application for pardon or on the granted pardon. Thus, anyone, including *Derg* officials who had been convicted of the commission of genocide, can deny the commission of genocide by the *Derg* regime without having to fear the wrath of the law. However, denying or arguing that politicide is not a form of genocide is not only unconvincing, but also a clear misreading of the Penal Code on the basis of which *Derg* officials were convicted of genocide. Granted, had they been prosecuted on the basis of the Genocide Convention, their acts would not have amounted to genocide. However, the applicable law in the Red Terror trials was not the Genocide Convention but rather the Ethiopian Penal Code, which progressively criminalized politicide as genocide just as it did in the case of ethnocide and other forms of genocide. This cannot be convincingly challenged, as it is not only within the sovereign power of states to enact such laws, but also doing so is a progressive measure that deserves credit. Even so, certain *Derg* crimes should not have been regarded as genocide since they were committed without *dolus specialis*, which is the core of the crime of genocide.

⁸¹ See *supra* Sect. 5.4.5.

⁸² Denial of the Armenian genocide is a crime in some countries although it has not been established by any court of law. However, acknowledgement of the Armenian genocide is a punishable crime in Turkey. Denial of the Tutsi genocide is a crime in Rwanda. Denial of the Holocaust has also been criminalized in several countries. See generally Tomuschat 2009, pp. 518–530.

6.1.6 *Offenders Oriented Approach: A Thin Slice of the Truth*

As stated in the preceding chapter, Ethiopia opted chiefly for a retributive justice mechanism in dealing with *Derg* crimes. The Transitional Government resorted to massive criminal prosecutions as an accountability mechanism. Other promising transitional justice mechanisms, such as, reparations; revamp, and especially a mechanism for establishing a comprehensive truth by means of providing a forum to the victims and perpetrators—establishment of a truth commission—were by and large not brought into play.

An attempt to establish the comprehensive truth and the historical record was made by means of a meticulous consideration of the voluminous quantity of testimony of witnesses. However, due to the inherent limitation of judicial processes in establishing the social truth, the comprehensive truth is not unearthed by such means. It is submitted that a truth finding and historical clarification commission should have been established as complementary to the accountability process.

The zeroing in on offenders, to the exclusion of compensating the victims of gross human rights abuses, limited the range of accountability mechanisms that could have been brought to bear in the Ethiopian transition. Admittedly, restitution of illegally confiscated properties was made to a certain extent.⁸³ The Ethiopian Privatization Agency (now Privatization and Public Enterprises Supervising Authority)⁸⁴ was given the power to review restitution claims in respect of illegally confiscated properties.⁸⁵ The Restitution Department of the Ethiopian Privatization Agency received over 22,000 applications from restitution claimants, but most of them were rejected because they did not meet the legally prescribed conditions for such claims to be processed. A total of 428 properties, which included 335 homes, 60 manufacturing firms and coffee processing plants, 22 service rendering enterprises, three dairy farms, two institutional buildings, and six other establishments, were returned to their respective rightful owners.⁸⁶

⁸³ Stan and Nedelsky 2013, p. 172.

⁸⁴ The Ethiopian Privatization Agency was established by Proclamation 87 of 1994 as amended by Proclamation 52 of 1996. It was tasked with the mandate to deal with the process of privatization. In addition, it was given the mandate to deal with restitution claims. Proclamation 87 of 1994 was repealed by Proclamation No. 146 of 1998.

⁸⁵ Proclamation 110 of 1995 as amended by Proclamation 193 of 2000.

⁸⁶ Wikleaks 2000. Among the property which was restored to its rightful owner was, the Wabe Shabale Hotel. It was returned to members of the Imperial Family. Monarchy Forum <http://royalcello.websitetoolbox.com/post/ethiopian-government-returns-nationalized-hotel-to-the-imperial-family-5182703>. Accessed 10 July 2016. The return of some properties took time in some cases due to contention between the current user and the rightful owner of the property. For instance, the restitution of the illegally confiscated house of Mehari Tewled located in Addis Abeba Bole, Woreda 17, Kebele 19 House No. 119, took over 17 years. In 2015, the Court ordered the Agency to restore the house to the rightful owner. See Dire Tube, http://www.diretube.com/court-orders-agency-to-give-back-bereket-simons-house-to-its-owner_a545c909a.html. Accessed 15 November 2016.

Other than these measures, the Transitional Government outlawed the *Derg*-WPE as a criminal institution and disqualified collectively members of the *Derg* administration and mass organizations, such as the urban dwellers' associations and the *kebeles*.⁸⁷ The judiciary, too, was purged.⁸⁸ The Transitional Government justified the need to debar the judges appointed by the former regime for the following reasons:

One is that the WPE succeeded in subverting the judiciary, and so it is necessary to cleanse the judiciary of its malign influence so as to restore its independence. There is a fear that former party members may also work to undermine the government's efforts, or at least fail to cooperate with them. A second argument is that the fact that a judge was a member of the WPE fatally undermines the public's confidence in that judge's rulings, making it necessary to remove the judge in order to facilitate the smooth working of the courts.⁸⁹

The army and police, too, were entirely demobilized.⁹⁰ The civil service was purged to a very limited degree. Of the roughly 200,000 civil servants only 300 were dismissed.⁹¹ Although the purging was an appropriate measure, it would have been proper to have carried it out on a case-by-case basis, especially the vetting of the judiciary. All of these point to the fact that a restorative justice mechanism hardly featured in the Ethiopian transition from the *Derg*.

Transitional justice mechanisms are not dichotomous; rather, they complement each other. When a transitioning state adopts mechanisms for reckoning with a troubled past, it should opt for those which are tailored to its specific context and realities. In addition, it is of pivotal importance to note that non-judicial mechanisms are not an alternative to judicial mechanisms and *vice versa*.

The Transitional Government, by not implementing comprehensive transitional mechanisms, failed to seize the ideal opportunity of building a bridge that would help the country to quickly move forward from its bleak past and unify all Ethiopians. To put it in simple terms, the government failed to opt for a diverse range of transitional mechanisms that would help to uncover the whole truth and bring closure.

⁸⁷ Stan and Nedelsky 2013, p. 171.

⁸⁸ *Ibid.*, p. 171. 'The Transitional Government has proposed to debar all former WPE members from serving as judges. This proposal does not extend to legal work outside the courtroom, and may be reversed in the permanent constitution. This places considerable obstacles in the way of restoring the judicial system to its former functions, because a high proportion of judges were members of the party. In the Supreme Court, 16 of the 33 judges are former party members; in the high courts, about half of the 143 judges are former WPE. Throughout the rest of the judiciary, the proportion is little different' see Human Rights Watch Africa 1992, p. 13.

⁸⁹ Human Rights Watch Africa 1992, p. 13.

⁹⁰ Stan and Nedelsky 2013, p. 171. Half a million members of the army of the Mengistu regime were demobilized between 1991 and 1994; and also over 22,000 fighters of the OLF were demobilized in 1998. See Kingma 1996, pp. 151–165; Kidane 2002, p. 671.

⁹¹ 'The systematic purge of civil servants has so far been limited to a relatively small number of senior officials, most of whom were political appointees anyway. The dismissals include managers of parastatals, vice-ministers and deputy ministers, commissioners and non-career diplomats.' Human Rights Watch Africa 1992, p. 11.

In Ethiopia, the opportunity to advance a democratic transition was lost not once but at least twice. Following the relatively bloodless revolution of 1974, there was a slight possibility to start on the road towards democratization, had it not been for the military junta's staunch clinging to power and refusal to make room for the creation of a civilian government. In hindsight, the post-Haile Selassie period might not have been ripe enough for the establishment of the democratic system. However, the post-*Derg* era was perhaps the most apposite time to kick-start the onset of democracy in Ethiopia. This is so because: first, unlike the *Derg* years, there were many united forces that could have assumed power and filled the political vacuum. Although the start was good, later on several of political groups, which participated in the July conference of 1991, had left the Tigray People Liberation Front or were expelled. Some groups were excluded from participating in the conference. Secondly, the Transitional Government could have started the long walk to democratization by adopting diverse transitional justice mechanisms. The Transitional Government adopted a narrowly conceived mechanism for dealing with the crimes of the former regime. It would have been more appropriate for the government to have concentrated its efforts in prosecuting only the most heinous crimes and in respect of the most responsible perpetrators. This would have expedited the process, making it fair and efficient.

More than this, overtaking the SPP with a truth finding and documentation role was an overambitious and impractical exercise, one which would have been less burdensome had a truth commission been established. The SPP paid scant attention to its truth finding duty. The fact of the matter is that the truth established by courts is not a substitute for the more comprehensive historical truth that could have been uncovered by a truth commission. The number of identified victims that the Court confirmed is one indicator of the limited kind of truth that courts can establish. In addition, many years after the demise of the *Derg* regime and the enforced disappearance of individuals, the next of kin continue to agonize about the uncertainty of what has happened to their relatives, and remain mystified as to their eventual fate. The circumstances surrounding the whereabouts of the famous novelist and journalist, Bealu, is an illustrative case in point.⁹²

Based on the transitional context of Ethiopia, it was necessary to establish a historical inquiry into what had happened, not only during the turbulent period of the *Derg* reign, but also in the era preceding it. Ethiopian history is rife with turbulent periods, historical injustices and their denial. Had a truth commission been set up, an even more encompassing record of what happened would have come to light if it had looked also into the unaddressed, controversial, historical

⁹² His wife, Almaz Abera, in an interview stated that she still does not know who killed her husband, and where he was buried is a mystery to her as it is for many Ethiopians. Kumneger Magazine 2015. Lieutenant Colonel Fisseha Desta, the third person in the *Derg* hierarchy, in his book titled 'The Revolution and My Reminiscence' clarified that Bealu was killed by the *Derg*'s intelligence because of the Oromay book he had published. However, he did not specifically spell out who killed him nor where and how he was killed. Desta 2014.

injustices and troubled past of the country since the creation of the modern state of Ethiopia from 1855 onwards.

As Bassiouni has noted, ‘accountability mechanisms, if they are to have a salutary effect on the future and contribute to peace and reconciliation, must be credible, fair and as exhaustive of the truth as possible.’⁹³ A comprehensive transitional justice mechanism helps not only to prevent future victimization but also to break the omerta of silence, the conspiracy of, or complacency with, the perpetration of historical injustice. The Ethiopian approach was not only limited or incomplete, but also failed to establish the comprehensive truth about the root causes of the conflict, the details surrounding the disappeared individuals, and to guarantee non-repetition. It, therefore, left some issues unaddressed and unsettled, which arguably contributed to the poor human rights record that followed the transition.

In examining the impact that transitions, trials in our case, have on the development of democracy and the prevention of a culture of impunity, one has to examine the human rights trend or situations before and after the transition. Usually the human rights record before the transition is dreadful. It is true that post-*Derg* Ethiopia is different from the ghastliness of the Ethiopia of the *Derg* period. However, Ethiopia remains an undemocratic country with largely unaccountable rules and characterized by human rights violations and corruption. The question to ask in this connection is: what would Ethiopia have looked like without the narrow transitional justice that the Transitional Government adopted? Would the respect for human rights be better or worse had there been no transitional mechanism adopted by the government? These are delicate questions to which there is no convincing answer. This is because there are countries whose human rights records actually deteriorated after transition.⁹⁴

It certainly cannot be argued or guaranteed that the establishment of a truth commission and the use of other accountability mechanisms would necessarily have deterred subsequent human rights violations, or have made their occurrence less likely. It is a trite fact that the goal of transitional justice is, among other things, to avoid a repetition of similar crimes in the future, even in most cases where such an objective is written into the operating mandates and reports of the truth commission or lies at the bottom of instituting criminal prosecutions. Needless to say, such express honorable objectives might not necessarily lessen the likelihood of violations in the future. Transitional justice mechanisms are therefore not a guarantee for the non-commission of human rights violations in the future. However, the more complete and fair the approaches are, the more effective their objectives will be. In other words, the use of incomplete, one-sided and less diverse transitional justice mechanisms would more often than not spawn another round of human rights violations in the future. The fact of the matter is that the unaddressed episodes of historical injustice will serve as embers that have the potential to spark renewed

⁹³ Bassiouni 2008, p. 24.

⁹⁴ For example Haiti, Mexico, Venezuela, see Sikkink and Walling 2007, pp. 427–445.

social conflict, with resultant human rights violations. Although Ethiopia opted for only one transitional justice accountability mechanism in the main, this is better than having done nothing at all to address the injustice of the past. However, it needs to be said that the country's failure to address the gross human rights violations of the past in a more comprehensive way has made the Ethiopian transition incomplete: small wonder that human rights violations persist under the EPRDF rule.

In general, Ethiopia's approach of confronting *Derg* crimes has been criticized on the basis of the one-sided nature of the accountability mechanism employed, delayed justice, narrow transitional justice mechanisms, use of capital punishment, trials *in absentia*, and bad human rights record that followed the transition. Some have also taken exception to the fact that the crimes committed by the *Derg* were classified as genocide. However, as submitted above, some of these objections are wholly unfounded. Admittedly, there have been valid criticisms levelled against the trials, but this does not mean that the Red Terror trials in particular and Ethiopian transition in general, were worthless and had nothing to offer other than a lesson not to repeat those shortcomings.

6.2 The Legacy of the Red Terror Trials to Ethiopia's Transition from the *Derg* Past

In his comments on the Tokyo trial, Bassiouni stated that 'Tokyo was a precedent that legal history can only consider with a view not to repeat it'.⁹⁵ So, do the Red Terror trials have something to offer, or are they just another addition to legal history for the world to view them solely as a guide for not making a similar mistake? Despite their shortcomings, it is submitted that the Red Terror trials are historically significant, for they have left some contributions as their legacy. The parts that follow deal with the contributions of the Red Terror trials.

6.2.1 *Trials, Not Summary Executions: Reversed Summary Vendetta?*

Before the 1991 transition, Ethiopia had neither a tradition of democracy nor official accountability mechanisms for addressing crimes of the former regimes. The approach that had always been available to an incoming government was instant justice by means of summary executions without any semblance of justice. In other words, the traditional method of administering justice was one characterized by summary executions. There was never a trend of addressing the injustices of

⁹⁵ Bassiouni et al. 1986, p. 64.

predecessor regimes by using a proper due process mechanism. Until 1991, almost all successor regimes settled their scores with their predecessors by resorting to summary justice. The summary execution of Emperor Haile Selassie and his senior officials is a textbook example of how a successor regime dealt with crimes committed by a predecessor dictatorship.⁹⁶ Similarly, victorious rebels had the opportunity for vengeful and punitive responses to the officials of the defeated *Derg* regime in 1991. However, in order to determine their criminality or otherwise, the Transitional Government decided to subject the former regime's officials to judicial process. By doing so the Transitional Government 'reversed' or at least challenged the deep-rooted continuum of summary justice, and set a remarkable precedent by breaking the mould and embracing justice to deal with the heinous crimes perpetrated by the officials of the defunct *Derg*. The very fact that the office of the SPP was created as a means of dealing with the unimaginable conflagration of Mengistu's reign represented a step forward, and this deserves credit. Unlike the *Derg* officials, who denied their victims the basic right to be heard (a simple fair trial right), the Transitional Government gave the perpetrators a chance to be heard and to defend themselves in a court of law.

It bears noting that giving an accused person a chance to be tried before a properly constituted court as opposed to summary justice is not a privilege; rather, it is a right of the accused person and a duty of states to avail this right to an accused person. However, in the Ethiopian transitions there had hardly ever been such practice of bringing the officials of a former regime before a properly constituted court. As set out above, the option was for so long a resort to extrajudicial killings. The Red Terror trials, however, represented a break with the past, for they took place before properly constituted courts. Thus a trend was reversed. Regardless of their abject drawbacks, at least the trial gave the accused an opportunity to defend themselves and to adduce whatever evidence they had to do so. An attempt was made to keep the process as fair as possible. In the Red Terror trials, the courts did not simply convict all *en masse*. Many were acquitted,⁹⁷ and some charges were withdrawn because of lack of evidence.⁹⁸ Similarly, the accused in the Red Terror trials were not sentenced to death collectively. In fact, of the approximately 3,000 *Derg* officials convicted, only 51 were sentenced to death.⁹⁹ Moreover, many of the conviction and sentencing decisions were not unanimous but determined by majority decisions. In the *Mengistu et al* case both the conviction and sentencing judgments were handed down by majority decisions.¹⁰⁰ Although superficial, such features of the trials testify to their fairness and are a far cry from the way the *Derg*

⁹⁶ Although a Commission was established to investigate the alleged corruption crimes committed by the detained Haile Selassie officials, the *Derg* aborted the process and pre-empted the outcome by executing the officials. Tiruneh 1995, p. 78.

⁹⁷ For a discussion of the finding of the FHC, see *supra* Sect. 5.3.5.

⁹⁸ *Supra* Sect. 5.3.3.

⁹⁹ *Supra* Sect. 5.3.6.

¹⁰⁰ Sects. 5.3.4 and 5.3.6.

officials had dealt with their victims. Hence, the opportunity that the accused were given in the Red Terror trials unlike the situation of their victims was not a facade and farcical, but rather to a large extent a genuine process. Thus the Red Terror trials set a precedent, and arguably ended the cycle of decimation of the officials of previous regimes by way of summary justice. For this reason, it can be regarded as a 'moment in Ethiopian history when new leaders stopped punishing the officials of predecessor regimes by way of summary justice rather for the first time let reason and justice governs punishment.'¹⁰¹

6.2.2 *Accountability for Heinous Crimes: Justice Redux*

As outlined in the historical chapter, *Derg* officials perpetrated horrendous crimes against ordinary Ethiopians. The senior *Derg* members used and licensed various instrument of oppressions. Executions of opponents were legalized (Red Terror authorized by law) and it was announced that the killing of opponents could not be regarded as the killing of innocent people but as celebration of the triumph over anti-revolutionaries, anti-people and anarchists. Not only was public mourning banned but families were required also to leave the corpses on the street as a warning to other potential dissidents. The 17 years of *Derg* rule instilled in the minds of Ethiopians that gross human rights violations, such as, the decimation of opponents on the spot by way of summary justice, and torture could be carried out with impunity. Simply put, instant summary execution and torture with impunity of any opponents of Mengistu regime became the norm. As aptly put 'in a cowed silence—or in a silent complicit—Ethiopians watched the horrors take place. The world outside seemed indifferent.'¹⁰²

The Red Terror trials to a certain extent challenged this trend by trying to restore the rule of law and justice. With the overthrow of the *Derg*, the perpetrators were brought to book. Ryle had this to say about how the defeated *Derg* officials looked on their way to court:

In Addis Ababa, on December 13th of last year, a blue bus with curtained windows, escorted by a motorcycle outride and a pair of glinting all-terrain vehicles, brought forty-four prisoners-middle-aged men in suits and handcuffs from an overcrowded prison called World's End to an improvised courtroom on the northern heights of the city. A few years earlier, the men on the bus had been all-powerful; their name, the *Derg*, the embodiment of dread.¹⁰³

The once powerful, dreaded, and untouchable accused who were members of the fallen dictatorial regime of Mengistu were brought to the dock. This reality sent a

¹⁰¹ Ehrenfreund 2007, p. 14.

¹⁰² The Economist 1994.

¹⁰³ The New Yorker 1995.

message that nobody is above the law¹⁰⁴ and it gave the victims a feeling that some sort of justice was being done, no matter how incomplete and imperfect it might be.¹⁰⁵ The victims, and Ethiopians in general, at long last were given a chance to make their agony heard.¹⁰⁶ The Red Terror trials brought to light the egregious human rights violations. It uncovered the mystery surrounding the enforced disappearance of some people, and confirmed to the families and Ethiopians generally that they were killed by the *Derg* regime.¹⁰⁷ Mass graves were exhumed and families were able to mourn and conduct proper reburials of the remains of their identified relatives. In this regard, it can be said that Red Terror trials have contributed to justice redux by ensuring accountability for serious crimes, which brought a measure of satisfaction to the victims. Even if the trials were far from perfect, the Red Terror trials were not sham trials. Tremendous effort was invested in according the accused fair trial rights, regardless of how odious their deeds were. The process was, therefore, not just the wreaking of vengeance by the victorious rebels over the officials of the former regime, but an attempt to let justice triumph. By bringing the accused before a court of law, the Ethiopian government showed openly that it was fulfilling its duty to hold former *Derg* criminals legally accountable, thereby signalling to the victims that it was serious about its intent to give effect to the duty it owed them. Therefore, despite all its imperfections, the trials have challenged the impunity of perpetrators of serious crimes.

6.2.3 *Legal Legacy*

Even though Ethiopia had enacted law on crimes under international law as early as 1957, the law was not put to the test until the Red Terror trials were held. During the *Derg* regime, the Penal Code remained intact although the military junta ignored it altogether. Hence, safe to say that Ethiopian law on core crime was in ‘hibernation’ until 1991. The trials served as a litmus test for how core crimes in the Penal Code could be prosecuted in Ethiopia. In other words, the Red Terror trials were

¹⁰⁴ In Ethiopia, there is a saying that ‘the sky cannot be plowed so Negus (Emperor) cannot be indicted.’ This is to show how the leaders have been untouchable and above the law. The Red Terror trials challenged this trend to some extent.

¹⁰⁵ For the satisfaction of seeing Melaku, Butcher of Gonder, and the 20th accused in the *Mengistu et al* case in dock, one woman had travelled from the province of Gonder (300 miles) to Addis, see *The New Yorker* 1995.

¹⁰⁶ Meshesha, who lost four of his children and two nephews, stated at the beginning of the process that ‘I am so please [sic] that after so many years there will be justice’, *The New York Times* 1994.

¹⁰⁷ The courts confirmed 12,733 as the number of identified victims of the Mengistu regime.

'guinea pigs' for the law on core crimes. The Red Terror trials contributed through interpreting and elaborating the law on genocide. The courts elaborated the formulation of political genocide under the Penal Code and rightly confirmed that the criminalization of genocide against groups not covered under the Genocide Convention was not only legitimate and the sovereign right of states, but also a progressive action. In this regard, the decisions can be taken as significant test and jurisprudence on the domestic prosecution of political genocide. Moreover, the Red Terror trials left a legal legacy by rejecting certain traditional objections, such as, claims to immunity and obedience to superior orders. As discussed in the previous chapter, although the accused raised immunity as a defense, the Court rightly rejected this defense.

In general, the Red Terror trials, even if they were marred by some pitfalls, contributed to partly ensuring accountability and thereby challenging the culture of pervasive impunity that reigned during the *Derg* regime.¹⁰⁸ At a time when only a few had attempted to prosecute perpetrators of gross human rights violations, Ethiopia judged *Derg* officials by using Ethiopian judges and domestic laws. Ethiopia's enforcement of international criminal law by employing its domestic justice machinery with little support from the international community is a progressive policy decision. For this attempt alone, the Transitional Government and the Red terror trials deserve credit. It could be said that the process was used to give credence to the political legitimacy of the then incoming government. Non-prosecution would have amounted to a display of complacency and may have generated the public impression that the new regime was in no way different from the old, except in that it wore a different mask.¹⁰⁹ Furthermore, failure to prosecute would have amounted to a violation of the duty to prosecute egregious human rights violations. Hence, the use of prosecution as a means to bolster political legitimacy was an unavoidable consequence of the transitioning process.

¹⁰⁸ Nonetheless, this does not mean that the Red Terror trials and the Ethiopian transition from *Derg* to EPRDF have contributed to ensuring non-repetition of similar state sponsored violence. In fact, it is far from that. Egregious human rights violations, such as, the post-2005 election violence, the killings during the protests in many parts of the country mainly in the Regional states of Oromia and Amhara, are still, pervaded by impunity. Even in most cases of these state sponsored crimes, the government accepts the killings, and there has not been accountability. Most of these egregious human rights violations meet the definitional elements of crimes against humanity. Similar to the victims and/or families of the victims of the *Derg*'s brutalities, for the thirst for justice to be quenched the victims of post-*Derg* state sponsored horrendous crimes have to wait until the 'apt time' comes. For more details on the state sponsored violence, see Human Rights Watch 2017, Amnesty International 2016.

¹⁰⁹ On this, see generally Huntington 1991; Roht-Arriaza and Mariezcurrena 2006; Teitel 1995, p. 146.

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Chapter 7

Concluding Remarks



This chapter draws the threads together and provides a brief summary of the book. It also embodies the author's concluding remarks and outlook.

The book's aims were to address two closely intertwined main objectives. The first objective was to examine the roadmap that Ethiopia chose to reckon with the *Derg*'s crimes. Secondly, to explore the legal framework to deal with the crimes committed by the *Derg* regime. To do so, the book consisted of seven chapters. Chapter 1 (supra Sects. 1.1, 1.2 and 1.3) outlined the introductory parts that aimed to set a context for the book.

In Chap. 2, the general factors that led to the coming into power of the *Derg* in 1974, the 17 years of *Derg* rule, the reign of terror and other relevant historical accounts that serve as a background to the study were highlighted. Accordingly, the chapter concluded that the inattentiveness of the Haile Selassie regime to socio-political and economic problems and demands of the Ethiopians not only led to the 1974 popular revolution but also created a political vacuum. The chapter showed that the absence of a unified political group that could fill the political vacuum steered the coming into power of the *Derg*. The *Derg* was a council that was composed of junior military officers. As highlighted in this chapter, the military junta led by Mengistu started gross human rights violations from its early days by summarily executing officials of the old regime whom it had arrested, followed by the purging of *Derg* members and leaders one after another. The *Derg*'s refusal to go back to its barracks led to unrest. Political groups, such as the Ethiopian People's Revolutionary Party, demanded that the military *junta* establish a popular government, while other groups, such as MEISON, created an alliance with the *Derg*. Nonetheless, the alliance did not last long. The Mengistu regime responded to the demands of the political groups in a violent manner. In 1977, former President Mengistu, who is now living in exile, officially launched the orgy campaign called Red Terror to decimate his opponents. Red Terror was authorized by law. The *kebeles*, urban dwellers' associations, revolutionary squads, *Seded*, and other instruments of repression were given the license to kill members and sympathizers of opposition groups, which had been labelled as

anti-revolutionary elements and anti-people. As shown in the chapter, even though the issue of who first pulled the trigger remains debatable, the opponents also carried out a sporadic campaign of assassinations of *Derg* officials. *Derg* members and leaders who opposed Mengistu's consolidation of power and action against opponents were not spared either. By the end of the 1970s, the Mengistu regime had eliminated its political opponents one after another.

The ethnic-based insurgents that had been fighting against the Mengistu regime for about 17 years, finally managed to defeat the regime in May 1991. The soldiers arrested a significant number of officials of the Mengistu regime. The insurgents established a Transitional Government in July 1991. As shown in this chapter, the Transitional Government was expected to not only recognize the basic rights of Ethiopians and restore peace but also to address the 17 years of egregious human rights violations that were perpetrated in the form of summary execution, torture, arbitrary arrest, and enforced disappearance. The Transitional Government of Ethiopia encountered several challenges in reckoning with the *Derg* past.

One of the formidable challenges for transitioning states in dealing with crimes of former regimes is an inadequate legal framework that criminalizes egregious human rights violations. With the aim of examining whether or not Ethiopia had faced such challenge, the third chapter dealt with Ethiopia's legal framework on crimes under international law. The chapter highlighted that since 1957 Ethiopia has had a comprehensive law on crimes under international law, particularly genocide and war crimes. Admittedly, crimes against humanity have not been criminalized as such. The chapter found that, under the Penal Code, the crime of genocide was defined broadly in terms of the typologies of protected groups. Succinctly put, political groups were recognized as one of the protected groups. In other words, politicide was criminalized as a form of genocide under Ethiopian law. The same approach is adopted under the new Criminal Code that replaced the 1957 Penal Code in 2004. The chapter also highlighted that relatively broad and structured modes of responsibility were adopted under the Penal Code. Hence, the chapter concluded that Ethiopia did not face a legal challenge in dealing with the *Derg* crimes. However, the absence of a law on crimes against humanity can be mentioned as a reason why *Derg* officials were not investigated and prosecuted for these crimes as such.

Having concluded in Chap. 3 (supra Sects. 3.1 and 3.3) that there was no formidable legal challenge in the Ethiopian transition from the *Derg* to the EPRDF, Chap. 4 (supra Sect. 4.3) analysed the approach that Ethiopia adopted to confront the *Derg* past. Before dealing with the Ethiopian roadmap, the chapter (supra Sect. 4.1) outlined the broad range of transitional justice mechanisms available to, and at the disposal of, transitioning states, namely prosecution, truth commission, reparation, and revamp. From the wide range of transitional justice mechanisms, the Transitional Government of Ethiopia opted for a predominantly retributive justice approach. In other words, the government made a policy decision to embark on an extensive and large-scale prosecution of *Derg* officials. To do so, the SPP with a twofold mandate was established in 1992. The SPP was empowered to investigate and prosecute *Derg* officials, and to establish accounts of the egregious human rights violations under the Mengistu leadership. There was no special tribunal

established to deal with *Derg* crimes. Instead, the charges were filed before the newly established ordinary courts across the country. As highlighted in Chap. 4 (supra Sects. 4.3.1 and 4.4), the SPP's preparation, investigation and collection of evidence took about two years. The first charge was not filed until October 1994. Consequently, the accused were detained without formal charges for about two to five years, since May 1991. The chapter concluded that the Ethiopian approach of reckoning with the *Derg* crimes was largely limited to an extensive criminal prosecution of the officials of the fallen regime.

Chapter 5 (supra Sects. 5.2 and 5.3), which is the core of the book, dealt with the prosecution of *Derg* officials for the crime of genocide as well as other crimes. The chapter highlighted the victims and accused in the Red Terror trials (supra Sect. 5.2). The Red Terror trials were a set of cases that were filed before the Federal High Court and Regional Supreme Courts. The trials were not limited to the prosecution of officials for the crime of genocide against political groups or politicide. Instead, the trials embodied other crimes, such as aggravated homicide, arbitrary arrest and abuse of power. In the Red Terror trials, over 5,000 accused were charged with those crimes under Ethiopian law. Of those, over 3,000 were found guilty. A significant number of the accused were tried, convicted, and sentenced *in absentia*. From the convicted individuals, about 1,100 were found guilty of the crime of genocide against political groups, and other crimes.

The *Mengistu et al* case was the core trial that illuminates many of the issues in the Red Terror trials. It is the case against the policy and decision makers. As shown in this chapter (supra Sect. 5.3), it is the case against those who planned, coordinated and authorized the perpetration of the egregious human rights violations. The *Mengistu et al* case was a case against the former President Mengistu, former Prime Minister, former Vice President, Foreign Affairs Minister and other high-ranking *Derg* officials. The case was filed before the Central High Court, later renamed the Federal High Court, in October 1994. In this case, 25 accused, including Mengistu, Hadis Tedla, and Berhane Bayeh, were tried *in absentia*. The prosecutor charged the accused with four crimes (212 counts), namely preparation and provocation to commit genocide, genocide against political groups, abuse of power, and arbitrary arrest. From an initial list of 106 co-offenders, only the first 12 accused were charged with all of the 212 counts.

The chapter outlined that the accused invoked, among other things, immunity, acts authorized by law, a period of limitations, and an objection related to the criminalization or otherwise of the crime of genocide against political groups. Following the SPP's rebuttal response to the objections, the Federal High Court rejected the accused's objections one after another and confirmed the charges on 9 October 1995. All the accused who were present entered a plea of not guilty.

As shown in the chapter, the SPP adduced a large number of witnesses (over 700), and a trove of documentary evidence. The SPP tendered a large number of documents, such as orders for summary executions, minutes of the *Derg*, and execution reports of the accused's own making. On 21 January 2003, the Court ruled that the accused should enter their defenses. The accused persons collectively adduced 65 witnesses and documentary evidence. They also individually called

several witnesses and tendered documentary evidence. After a protracted trial, the Trial Court passed its long-awaited verdict on 12 December 2006. The Court, by a majority vote of two to one, found 55 accused, including Mengistu, guilty of preparation and provocation to commit genocide, abuse of power and arbitrary arrest. In addition, the first 12 accused, including Mengistu, were found guilty of the commission of genocide against political groups. Begashaw Guremssa, accused number 41, was acquitted of all the charges by a unanimous decision.

On 11 January 2007, the Federal High Court sentenced 48 accused to life imprisonment and seven to prison terms ranging from 23 to 25 years of rigorous imprisonment. The SPP appealed against the sentences of 21 accused. Similarly, 23 accused, including 13 respondents, appealed against the conviction and sentencing judgments of the Federal High Court. In 2008, the Supreme Court dismissed the appeal by the accused while it accepted the SPP's grounds of appeal. The Supreme Court reversed the Federal High Court sentencing judgment and imposed death sentences on 18 respondents, including former President Mengistu. From this, it is clear that the main Red Terror trial took a protracted period to come to its logical conclusion. However, the chapter showed that there were other Red Terror trials that were concluded within a relatively shorter period.

The other core chapter of the book, Chap. 6 (supra Sects. 6.1 and 6.2), undertook a critical analysis of the Red Terror trials. In this chapter, the author examined the limitations and also the contributions of the investigation and prosecution of *Derg* crimes and the Ethiopian transition in general. Accordingly, the chapter showed that the protracted nature of the trials, especially the main Red Terror trial, was the main drawback. The accused were detained without formal charges for an unreasonable (or unjustifiable) time, and also the length of time that the trials took should have been avoided by adopting different strategies. Although the prevailing circumstances at the time of the transition from *Derg* to EPRDF, such as the scale of the crimes, the wholesale collapse of the justice machinery, and limited resources (emptied public coffers), explain the protracted nature of the trials to a certain extent, these could not justify the unreasonable period that some of the trials took.

It was argued that instead of the investigation and prosecution of virtually all *Derg* crimes and lower level officials, it would have been appropriate to focus on those with the greatest responsibility. In addition, the narrow construction of the Ethiopian approach of reckoning with *Derg* crimes should have been widened to embody the much needed broad range of transitional justice mechanisms, specifically a truth-finding, telling and historical clarification mechanism. This would have helped not only to unearth the truth comprehensively and to uncover the root causes of the conflict, but also to reduce the burden of the SPP, and, in turn, could have expedited the process. As argued in the chapter, some of the acts that the *Derg* officials had perpetrated should not have been treated as genocide (against political groups). As shown in the chapter (supra Sect. 6.1.5), most of the acts of the *Derg* officials fulfilled the elements of the crime of genocide against political groups, or politicide, as enshrined under Ethiopian law, which was in force long before the perpetration of the alleged crimes. Nonetheless, some acts or counts should not have been considered politicide because they lacked the required *dolus specialis*.

The use of capital punishment, trial *in absentia*, and victor's justice are also mentioned as shortcomings of the trials. However, the latter shortcomings do not in and of themselves make the trials irrelevant or less significant.

Even though the trials suffered from some limitations that does not mean that the Red Terror trials have nothing to offer. Furthermore, by their contribution to the practice of domestic prosecution of genocide against political groups and the enforcement of international criminal law by domestic courts, the trials have played a role in challenging a deep-rooted culture of summary justice. They have also served as a litmus test for the Ethiopian law on crimes under international law. In addition, the trials have dispensed some sort of justice to the victims of human rights violations. The chapter concluded that justice dispensed by the Red Terror trials was an incomplete justice but that 'half a loaf is better than nothing'.

7.1 Recommendations

Based on the findings of the enquiry, the author submits the following recommendations. First, since the crimes perpetrated during the 17 years of *Derg* rule have not been fully unearthed by the retributive approach that the Transitional Government charted, the Ethiopian government should consider establishing a truth-finding and historical clarification commission with the objectives to establish the whole truth, clarify historical oxymoron, and also promote reconciliation. As noted in the book, Ethiopian history is full of contested human rights violations and historical injustices; hence, the would-be truth-telling and historical clarification commission should be empowered to establish accounts of serious human rights violations before, during and after the *Derg* regime. In addition, the recurrent famines that have claimed the lives of many Ethiopians before, during and after the *Derg* regime shall also be within the mandate of the would-be truth commission so that it will establish the degree of Ethiopian regimes' involvement and accountability for the deaths that ensued.

Secondly, the author urges the Ethiopian government to take palpable action to secure the extradition of Mengistu; or to trigger the investigation and prosecution of the crimes committed by Mengistu, in a third state or before a Habre-like court. Among other things, the author suggests that the Ethiopian government should consider initiating action against Zimbabwe before the ICJ on the basis of an *erga omnes* duty to prosecute or extradite those accused of torture and crimes against humanity. Despite Zimbabwe's rejection or acceptance of the ICJ jurisdiction, and the ICJ's possible ruling on the matter following the unlikely acceptance of jurisdiction by Zimbabwe, the mere act of initiating the matter would help to bring the Mengistu issue to the forefront of the awareness of the international community. This might then trigger states and different organizations to look for an option on how to ensure accountability for the Mengistu crimes.

Thirdly, the Ethiopian government should take pragmatic action to ensure the enforcement of sentences imposed on the two senior officials who have been

sheltered in the Italian Embassy in Addis Abeba since 1991. The government should give assurances to the Italian authority that the death sentences would not be executed if the two convicted persons were extradited. If Italy refuses to extradite them after the assurances are given, the Ethiopian government should initiate action against Italy before the ICJ based on *aut dedere aut judicare*.

Fourthly, the Ethiopian law-making organ should enact laws that criminalize crimes against humanity as such. Moreover, a more nuanced command responsibility principle, which includes liability for failure to prevent crimes committed by one's subordinates or for failure to punish them, should also be introduced under the Criminal Code.

Fifthly, to the author's knowledge, there is no (national) memorialization centre or museum that the government has established for the remembrance and honouring of victims of gross human rights violations during the *Derg* regime. The government should consider establishing victims' remembrance and honouring centres across the country. Or alternatively the existing Red Terror Martyrs Memorial Museum should be institutionalized and decentralized across the country. In addition, the documents that were collected by the SPP should be made available to the public in the would-be museums (or existing, if any) and public libraries. The government and other entities should also consider cataloguing and documenting all the materials relating to the Red Terror trials, which are scattered throughout the country.

Sixthly, the Ethiopian government should apologize to the victims of the Red Terror and the White Terror. Thus far, the government has not made an official apology for the crimes perpetrated by the former regimes. Although the current government did not carry out the Red Terror, it has the moral, if not legal, obligation, to offer an apology to the victims.

Annexes

- 1. Chronology of Events in the Ethiopia’s Transition from *Derg* to EPRDF
- 2. Excerpts from the Penal Code Provisions on the Crime of Genocide and War Crimes
- 3. Provision of the Penal Code on Principal Modes of Responsibility
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1. Chronology of the Ethiopian Transition from the *Derg* to the EPRDF

The <i>Derg</i> came to power—the aristocratic feudal monarchy was toppled and replaced by the totalitarian military junta	12 September 1974
Summary execution of the ‘sixty’	24 November 1974
Execution of the Emperor	25 August 1975
Decimation of <i>Derg</i> leaders by Mengistu and his supporters	1975–1977
White Terror (targeted killings of <i>Derg</i> officials and supporters) started by the EPRP	(early) 1976
‘ቀይ ሽብር’ (Qey Shebir in Amharic) or Red Terror officially launched—licence to kill and ferreting out political opponents. Mengistu in his speech at revolutionary square declared ‘death to counter revolutionaries, death to EPRP’ and threw three bottles filled with red liquid signifying what his regime was prepared to do to political opponents	September 1977–1978

(continued)

(continued)

Ethnic-based insurgents deposed the <i>Derg</i> by complete military defeat	28 May 1991
Some 2,000 <i>Derg</i> officials were arrested	May–July 1991
Transitional Charter (Interim Constitution) which established the Transitional Government was adopted	5 July 1991
The Transitional Government established the SPP	8 August 1992
Girma Wakjira appointed as the Chief Prosecutor of the SPP	September 1992
The Transitional Government established three levels of new court system both at the Central (Federal) and Regional levels	January 1993
Habeas Corpus applications filed by the detainees	February–July 1993
Ethiopia Ratified the ICCPR	11 June 1993
Public Defender's Office Established	January 1994
First Red Terror case (<i>Mengistu and others</i>) filed before the then Central High Court	25 October 1994
Motion to Dismiss the Charges submitted by Mengistu and others	7 March 1995
The SPP's filed its Rebuttal to the objections	23 May 1995
The FHC Ruled on the Objections	9 October 1995
First Red Terror case (<i>Geremew Debela</i> , the case against the former Minister of Agriculture) came to its logical conclusion	November 1999
The first death sentence in the Red Terror cases was handed down by the Federal High Court (in the case of <i>Getachew Tekeba</i>)	9 December 1999
The Main Trial of the <i>Mengistu and others</i> started (The SPP adduced trove of documentary evidence and over 700 witnesses)	13 December 1999
The Court decided that the defendants should enter their defence	21 January 2003
Verdict passed	12 December 2006
Sentencing Judgement rendered	11 January 2007
The SPP and 23 convicts appealed	January 2007
The Appellate Court reversed the FHC sentencing decision and imposed death sentences on 18 respondents	2008
The death sentences of 23 <i>Derg</i> officials commuted to life imprisonment	28 May 2011 (On the 20th anniversary of the downfall of the <i>Derg</i>)
16 <i>Derg</i> officials who had been serving their sentences were released on Parole	5 October 2011

2. Excerpts of the Penal Code Provisions on the Crime of Genocide and War Crimes

Special Part, Book III

Title II

Offences Against the Law of Nations

Chapter I. Fundamental Offences

Article 281 Genocide; Crimes against Humanity.

Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engaged in, be it in time of war or in time of peace:

- (a) Killings, bodily harm or serious injury to the physical or mental health of members of the group, in any way whatsoever; or
- (b) measures to prevent the propagation or continued survival of its members or their progeny; or
- (c) the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance,

is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

Article 282 War crimes against the Civilian Population.

Whosoever, in time of war, armed conflict or occupation, organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions:

- (a) killings, torture or inhuman treatment, including biological experiments, or any other acts involving dire suffering or bodily harm, or injury to mental or physical health; or
- (b) wilful reduction to starvation, destitution or general ruination through the depreciation, counterfeiting or systematic debasement of the currency; or
- (c) the compulsory movement or dispersion of the population, its systematic deportation, transfer or detention in concentration camps or forced labour camps; or
- (d) forcible enlistment in the enemy's armed forces, intelligence services or administration; or
- (e) denationalization or forcible religious conversion; or
- (f) compulsion to acts of prostitution, debauchery or rape; or
- (g) measures of intimidation or terror, the taking of hostages or the imposition of collective punishments or reprisals; or

- (h) the confiscation of estates, the destruction or appropriation of property, the imposition of unlawful or arbitrary taxes or levies, or of taxes or levies disproportionate to the requirements of strict military necessity,

is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.

Article 283 War Crimes against wounded, sick or shipwrecked persons.

Whosoever, in the circumstances defined above, organizes, orders engages in:

- (a) killings, torture or inhuman treatment or other acts entailing dire suffering or physical or mental injury to wounded, sick or shipwrecked persons, or to members of the medical or first-aid services; or
- (b) the destruction, rendering unserviceable or appropriation of supplies, installations or stores belonging to the medical or first-aid services, in a manner which is unlawful, arbitrary or disproportionate to the requirements of strict military necessity,

is punishable in accordance with Article 282.

Article 284 War Crimes against prisoners and interned persons.

Whosoever, in the circumstances defined above:

- (a) organizes, orders or engages in killings, acts of torture or inhuman treatment or acts entailing dire suffering or injury to prisoners of war or interned persons; or
- (b) compels such persons to enlist in the enemy's armed forces or intelligence or administrative services,

is punishable in accordance with Article 282.

Article 285 Pillage, Piracy and Looting.

Whosoever organizes, orders or engages in looting, piracy, pillage, economic spoliation or the unlawful destruction or removal of property of pretext of military necessity, is punishable in accordance with Article 282.

Article 286 Provocation and Preparation.

Whosoever, with the object of committing, permitting or supporting any of the acts provided for in the preceding articles:

- (a) publicly encourages them, by word of mouth, images or writings; or
- (b) conspires towards or plans with another, urges the formation of, a himself forms a band or group, joins such a band or group, adhere to its schemes or obeys its instructions,

is punishable with rigorous imprisonment not exceeding five year.

Article 287 Dereliction of duty towards the enemy.

Whosoever, in time of war and contrary to public international law and humanitarian convention:

- (a) kills or wounds an enemy who has surrendered or laid down his arms, or who for any other reason is incapable of defending, or has ceased to defend, himself; or
- (b) mutilates a dead person; or
- (c) lays hands on or does violence to a wounded, sick or dead enemy on the field of battle, with intent to rob or plunder him; or
- (d) orders one of the above acts,

is punishable with rigorous imprisonment or, in cases of exceptional gravity, with death.

Article 288 Use of illegal means of combat.

Whosoever uses, or orders to be used, against the enemy any means or method of combat expressly forbidden by international conventions to which Ethiopia is a party, or by the standing orders of the Ethiopian Army, is punishable with simple imprisonment for not less than three months, or, if the offence is grave, with rigorous imprisonment from three years to life; in the gravest cases the offender is punishable with death.

Article 289 Breach of Armistice or Peace Treaty.

Whosoever, having been officially informed of an armistice or peace treaty duly concluded, contrary to the orders given continues hostilities, or in any other way knowingly infringes one of the agreed condition, is punishable with simple imprisonment or, in more serious cases, with rigorous imprisonment not exceeding ten years.

Article 290 *Franc Tireurs*.

Whosoever not being a member of an armed force or auxiliaries recognized by the Imperial authorities, engages, in time of war and contrary to public international law, in hostile acts against the Ethiopian Army, its services or its lines or means of communication or transport, is punishable with rigorous imprisonment from three years to life, or, in cases of exceptional gravity, with death.

Article 291 Maltreatment of, or dereliction of duty towards, wounded, sick or prisoners.

Whosoever in violation of the rules of public international law, maltreats a sick or wounded man, or a prisoner of war or war internee, or uses. violence against him, or prevents him from exercising or makes it impossible for him to exercise, the rights guaranteed to him by such rules, or issues orders to the same effect, is punishable with simple imprisonment not exceeding five years.

Article 292 Denial of Justice.

Whosoever, in time of war or occupation and in violation of the rules of public international law, deprives a civilian, a wounded man, a prisoner or an internee, of his right to be tried according to law guaranteeing. Him humane treatment and the free exercise of his right to defend him self, or orders such deprival, is punishable with simple imprisonment.

Chapter II Offences Against Protecting Institutions

Article 293 Hostile Acts against International Humanitarian Organizations.

Whosoever;

- (a) indulges in hostile acts against or threats or insults to persons belonging to the International Red Cross or to corresponding humanitarian relief organizations (the Red Crescent, the Red Lion or the Red Sun) or to the representatives of those organizations or to persons placed under their protection; or
- (b) intentionally destroys or damages in the course of hostilities material, installations or depots belonging to these organizations, is punishable with simple imprisonment.

Article 294 Abuse of International Emblems and Insignia.

Whosoever;

- (a) wears or files without due authorization the emblems or insignia of one of the international humanitarian organizations mentioned above; or
- (b) abuses such emblems or insignia or any other protective device recognized in public international law, in particular the white flag, with intent to prepare or to commit hostile acts,

is punishable with simple imprisonment, or, in cases of exceptional gravity, with rigorous imprisonment not exceeding five years.

Article 295 Hostile Acts against the Bearer of a Flag of Truce.

Whosoever maltreats, threatens, insults or unjustifiably detains an enemy bearing a flag of truce, or an enemy negotiator, or any person accompanying him, is punishable with simple imprisonment.

3. The Penal Code Provision on Principal Modes of Responsibility

Chapter III Participation in an Offence

Article 32 Principal Act: Offender and Co-offenders.

- (1) A person shall be regarded as having committed an offence and punished as such if:
 - (a) he actually commits the offence either directly or indirectly, for example by means of an animal or a natural force; or
 - (b) he without performing the criminal act itself fully associates himself with the commission of the offence and the intended result; or
 - (c) he employs a mentally deficient person for the commission of an offence or knowingly compels another person to commit an offence.
- (2) Where the offence committed goes beyond the intention of the offender he shall be tried in accordance with Article 58 (3).
- (3) Where several co-offenders are involved they shall be liable to the same punishment as provided by law.

4. The Proclamation that Established the SPP

አዋሳ አንደኛ ዓመት ቁጥር ፲፭
51st Year — No. 18



አዲስ አበባ ነሐሴ ፳፱፻፲፱ ዓ. ፑ.
Addis Ababa, 8th August, 1992

የኢ.ት.ዮ.ድ.ዎ. የሽግግር መንግሥት

ነጋሪት ጋዜጣ
NEGARIT GAZETA
OF THE TRANSITIONAL GOVERNMENT OF ETHIOPIA

የአገሩ ዋጋ 1.30

በኢ.ት.ዮ.ድ.ዎ. የሽግግር መንግሥት
የተወካዮች ምክር ቤት ተጠባባሪነት የወጣ

የፖስታ ግጥን ቁጥ. ፳፻፩ 80,001

ግ ው ጫ

አዋጅ ቁጥር ፳፱/፲፱፻፲፱ ዓ. ፑ.

የልዩ ዓቃቤ ሕግ ጽሕፈት ቤትን ለማቋቋም የወጣ
አዋጅ ገጽ ፻፬

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አዋጅ ቁጥር ፳፱/፲፱፻፲፱ ዓ. ፑ.

የልዩ ዓቃቤ ሕግ ጽሕፈት ቤትን ለማቋቋም የወጣ አዋጅ

የኢትዮጵያ ሕዝቦች ባለፉት አሥራ ሰባት ዓመታት በአምባገነነት ደርግ/አሠፓ መንግሥት ሰብአዊና የፖለቲካ መብታቸውን ተገፊው በከፍተኛ ጭቆና ፋሽስታዊ ሥርዓት ተግባር ሥር መቆራቆዛቸውንና መሰዋታቸውን በመገንዘብ ፤ በኢትዮጵያ ሕዝቦች ታሪክ ውስጥ ልዩ ቦታ የሚሰጣቸው እጅግ አስከሬና አስታቂ የወንጀል ድርጊቶች የደርግ/አሠፓ መንግሥት ባለሥልጣኖች ፤ የደግንነትና የጦር ኃይሎች አባሎችና ተባባሪ ግለሰቦች በኢትዮጵያ ሕዝቦች ላይ መፈጸማቸውን በማወቅ ፤ የአምባገነነት ደርግ/አሠፓ መንግሥት ባለሥልጣኖችና ተባባሪ ግለሰቦች በጥፍ የሕዝቦችን ንብረት በመቀማት በሕገ ወጥ መንገድ በመውረስ ፤ በማጥፋት እንዲሁም የሕዝብና የመንግሥት ንብረቶችን በመመዝበር የሀገሪቱ ኢኮኖሚ እንዲቆረቁዝ ማድረጋቸውን በመገንዘብ ፤ የኢትዮጵያ ሕዝቦች አብዮታዊ ደሞክራሲያዊ ግንባር ታሪካዊ ጎጂነት በመጠናቀቁ ሀገሪቱን በተቆጣጠረበት ወቅትና ከዚያም በኋላ በቁጥጥር ሥር እንዲውሉ የተደረጉ ወንጀል ፈጽመዋል ተብለው የሚጠረጠሩ የአሠፓ የሰላይ ባለሥልጣኖች ፤ የደግንነትና የጦር ኃይሎች አባሎች ፤ የመንግሥት ባለሥልጣኖች እንዲሁም በወንጀሉ አፈጻጸም በኩሉም ነዋሪዎችና በገበሬ ማኅበሮች ስምና በግለሰብ ደረጃ ተባባሪዎች የነበሩ ሁሉ ፍትህ የተሞላበት ፍርዳቸውን እንዲቀበሉ ግድረግ አስፈላጊ መሆኑን በመገንዘብ ፤

PROCLAMATION NO. 22/1992
A PROCLAMATION TO PROVIDE FOR THE
ESTABLISHMENT OF THE SPECIAL PUBLIC
PROSECUTOR'S OFFICE

WHEREAS the people of Ethiopia have been deprived of their human and political rights and subjected to gross oppression under the yoke of the fascistic rules of the Dergue-WPE regime for the last seventeen years;

WHEREAS heinous and horrendous criminal acts which occupy a special chapter in the history of the peoples of Ethiopia have been perpetrated against the people of Ethiopia by officials, members and auxiliaries of the security and armed forces of the Dergue-WPE regime;

WHEREAS officials and auxiliaries of the Dergue-WPE dictatorial regime have impoverished the economy of the Country by plundering illegally confiscating and destroying the property of the people as well as by misappropriating public and state property;

WHEREAS, in view of the fact that the historical mission of the Ethiopian People's Revolutionary Democratic Front (EPRDF) has been accomplished, it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time the EPRDF assumed control of the Country and thereafter and who are suspected of having committed offences, as well as representatives of urban dwellers associations and peasants associations, and other persons who have associated themselves with the commission of said offences, must be brought to trial;

የኢትዮጵያ ሕዝቦች በደርግ/ኢሥፓ መንግሥት አጣካ ንፍቅ የደረሰባቸውን አረመኔዊ ወንጀሎች፣ የገብረትና የሀብት ምዝብራ ለመውጣት ውልድ በሐቀኛ መንገድ መዝገብ ግብዓትና ላገም የዚያን ዓይነት የመንግሥት ሥርዓት እንዲያደገም ግብንዘብና ግብተግብ ትክክለኛ ታሪካዊ ግላጅ መሆኑን በግመን፤

በቁጥጥር ሥር የሚገኙትም ሆኑ በቁጥጥር ሥር ሳይሆኑ በሀገር ውስጥና በውጭ የሚገኙ በወንጀል የሚጠየቁ ሰዎች ሁሉ ጉዳያቸው በአስቸኳይ እየተጣራ ለፍርድ እንዲቀርቡ ለማድረግ እንድ ራሱን የቻለ የልዩ የቃቤ ሕግ ፍርድ ሕግ ግድግዳ በግብረሰታት፤

በኢትዮጵያ የሽግግር ወቅት ቻርተር አንቀጽ ፱/መ/ መሠረት የሚከተለው ታውቋል።

፩. አጭር ርዕስ
ይህ አዋጅ «የልዩ የቃቤ ሕግ ፍርድ ሕግ ግድግዳ ሕግ» ለዋጅ ቁጥር ፳፱/፲፱፻፹፪ ተብሎ ሲጠቀስ ይችላል።

፪. መጽደም

አ. የልዩ የቃቤ ሕግ ፍርድ ሕግ (በዚህ በኋላ «ፍርድ ሕግ» ቢባል) ተብሎ የሚጠራ በዚህ አዋጅ ተቋቁሟል።

ለ. ፍርድ ሕግ ተጠሪነቱ ለሽግግር መንግሥት ጠቅላይ ሚኒስትር ይሆናል።

ለ. ፍርድ ሕግ ተጠሪነቱ እንደ የልዩ የቃቤ ሕግ ሹም፣ ምክትልና ረዳት የልዩ የቃቤ ሕግ ሹሞች ልዩ የቃቤ ሕግ እንዲሁም ለሥራው አስፈላጊ የሆኑ ሠራተኞች ይኖሩታል።

ለ. አገልግሎት

አ. የልዩ የቃቤ ሕግ ሹምና ምክትል የልዩ የቃቤ ሕግ ሹሞች ሹሞች በጠቅላይ ሚኒስትሩ መራጭ ነት በፕሬዚዳንቱ ለተወካዮች ምክር ቤት ቀርቦ ይጸድቃል።

ለ. ረዳት የልዩ የቃቤ ሕግ ሹሞችና ሌሎች ልዩ የቃቤ ሕግ በልዩ የቃቤ ሕግ ሹሙ አቅራቢነት በጠቅላይ ሚኒስትሩ ይሾማሉ።

፱. የሥራ ዘመን

የፍርድ ሕግ የሥራ ዘመን ሥራው እንደተጠናቀቀ የሚያበቃ ይሆናል።

፳. ለልዩ የቃቤ ሕግነት የሚያበቁ ሁኔታዎች

የሚከተሉትን ሁኔታዎች የሚያሟላ ማንኛውም ኢትዮጵያዊ በልዩ የቃቤ ሕግነት ሊሾም ይችላል፤

አ. ለኢትዮጵያ የሽግግር ወቅት ቻርተር ታግኝ የሆነ፤

ለ. በሕግ ትምህርት የሠለጠነና ወይም በልምድ በቂ የሕግ ዕውቀት ያካበተ፤ በሕግ ላይ ተመርኩዞ ትክክለኛ ውሳኔ መስጠት የሚችል፤

WHEREAS it is in the interest of a just historical obligation to record for posterity the brutal offences the embodiment of property perpetrated against the people of Ethiopia and to educate the people and make them aware of those offences in order to prevent the recurrence of such a system of government;

WHEREAS it is necessary to provide for the establishment of a Special Public Prosecutor's Office that shall conduct prompt investigation and bring to trial detainees as well as those persons who are responsible for having committed offences and are at large both within and without the Country;

NOW THEREFORE, in accordance with Article 9(d) of The Transitional Period Charter of Ethiopia, it is hereby proclaimed as follows:

1. Short Title
This Proclamation may be cited as the "Special Public Prosecutor's Office Establishment Proclamation no. 22/ 1992."

2. Establishment

- 1. The Special Public Prosecutor's Office (hereinafter the "Office") is hereby established.
- 2. The Office shall be accountable to the Prime Minister of the Transitional Government.
- 3. The Office shall have a Chief of the Special Public Prosecutors, Deputy and Assistant Chiefs of the Special Public Prosecutors, other Special Public Prosecutors and the necessary staff.

3. Appointment

- 1. The appointment of the chief and the Deputy Chief of the Special Public Prosecutors shall be approved by the Council of Representatives upon recommendation by the Prime Minister and presentation by the President.
- 2. Assistant Chiefs of the Special Prosecutors and other Special Public Prosecutors shall be appointed by the Prime Minister upon presentation by the Chief of the Special Public Prosecutors.

4. Term of Office

The term of the Office shall terminate upon the accomplishment of its task.

5. Qualification for the Appointment of Special Public Prosecutors

Any Ethiopian citizen who:

- 1. is faithful to the Transitional Period Charter of Ethiopia;
- 2. is either trained in law or has acquired broad legal skill through experience and capable of rendering proper decision based on law;

- ፫. በታሪኩ ላይ፡ በታማኝነቱና በሥነ ምግባሩ መልካም ስም ያተረፈ፡ በልዩ ዓቃቤ ሕግ በሚታዩ ወንጀሎችም ምንም ዓይነት ተሳትፎ ያልነበረው ለና
- ፬. የአሁኑ ወይም የደግነት ለባል ያልነበረ ።
- ፭. የጽሕፈት ቤቱ ሥልጣን
- ጽሕፈት ቤቱ በደርግ አሁኑ ሥርዓት በፖርቲ፣ በመንግሥት ወይም በሕዝባዊ ድርጅት የነበረውን ሥልጣን መከታተል፣ በማድረግ ወንጀል ፈጽሟል ወይም በወንጀል ተጠያቂ ነው በሚለው በግንኙነት ሰው ላይ በሕግ መሠረት ምርመራ የማካሄድና ከሰ የመመሥረት ሥልጣን ይኖረዋል ።
- ፮. በሥራ ላይ ያሉ ሕጎች ተፈጻሚነት፤
- ፩. የወንጀል ምርመራና ከሰን እንዲሁም ዓቃቤያን ሕግን የሚመለከቱ የሀገሪቱ ሕጎች ጽሕፈት ቤቱ ለሚያከናውናቸው ተግባሮች ተፈጻሚነት ይኖራቸዋል ።
- ፪. የዚህ አንቀጽ ንዑስ አንቀጽ (፩) ሲኖርም ከሰ የሚቀርብበትን የደርጋ ጊዜ የሚመለከቱ ድንጋጌዎችና የከሰና መልስ እንዲሁም የማስረጃ ማስገቢያ የጊዜ ገደቦች ሁሉ በዚህ ጉዳይ ላይ በሚቀርቡ ከሰች ላይ ተፈጻሚነት አይኖራቸውም ።
- ፫. በዚህ አዋጅ አንቀጽ ፮ መሠረት የልዩ ዓቃቤ ሕግ ሥልጣን በሆነ ጉዳይ ይህ አዋጅ ከመውጣቱ በፊት ተይዘው በአሥር ላይ የሚገኙ ሰዎችን በሚመለከት የፍትሕ ብሔር ሥነ ሥርዓት ሕግ ቁጥር ፩፻፳፮/ሀቢያስ ኮርፐሽን/ ይህ አዋጅ ከወጣበት ቀን ጀምሮ ለሰድስት (፮) ወራት ተፈጻሚ አይሆንም።
- ፬. በልዩ ዓቃቤያን ሕግ ስለሚሰጡ ውሳኔዎች
- ማንኛውም የበላይ ልዩ ዓቃቤ ሕግ በበታች ልዩ ዓቃቤ ሕግ የተሰጠውን ውሳኔ ወይም የተወሰደውን እርምጃ ለማሻሻል፣ ለማገድ፣ ለመለወጥ፣ ለመሻር ወይም ለማጽናት ይችላል ።
- ፭. ለመደበኛ ዓቃቤ ሕግ መሥሪያ ቤት ስለማስተላለፍ፤
- ጽሕፈት ቤቱ በምርመራ ወቅት ከሥልጣኑ ውጭ ሆኖ ያገኛቸውን የወንጀል ጉዳዮች ለመደበኛ ዓቃቤ ሕግ መሥሪያ ቤት ያስተላልፋል ።
- ፮. ውክልና ስለመስጠት
- ፩. ጽሕፈት ቤቱ አስፈላጊ ሆኖ ሲያገኘው በዚህ አዋጅ አንቀጽ ፮ መሠረት ለጽሕፈት ቤቱ መቅረብ ከሚገባቸው የወንጀል ጉዳዮች መካከል በጽኑ እሥራት የማያስቀጡ ወንጀሎችን እንደሁኔታው አይቶ ለመደበኛ ዓቃቤ ሕግ መሥሪያ ቤት በውክልና ሊለቅ ይችላል ።
- ፪. በዚህ አንቀጽ ንዑስ አንቀጽ (፩) መሠረት የሚሰጥ ውክልና የልዩ ዓቃቤያን ሕግ ሹመና ምክትሎቹ በአንድነት ሆነው የሚወስኑት ይሆናል ።

3. has distinguished himself by his diligence, integrity and good conduct and has not, in any way, participated in the offences to be prosecuted by the Special Public Prosecutors; and
4. was not a member of the WPE or of the security force; may be appointed as a Special Public Prosecutor.
6. *Powers of the Office*
The Office shall, in accordance with the law, have the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Dergue-WPE regime.
7. *Applicability of Existing Laws*
1. Laws concerning criminal investigation and instituting criminal proceedings as well as laws applicable to the ordinary prosecutors shall also apply to the activities undertaken by the Office.
2. Notwithstanding the provisions of sub-article (1) of this Article, the provisions concerning limitation of criminal action and the time limit concerning the submission of charges, evidence and pleading to charges shall not be applicable to proceedings instituted by the Office.
3. The provisions of habeas corpus under Article 117 of the Civil Procedure Code shall not apply to persons detained prior to the coming into force of this Proclamation for a period of six months starting from the effective date of this Proclamation in matters under the jurisdiction of the Special Prosecutor as indicated in Article 6 hereof.
8. *Decisions of the Special Public Prosecutors*
A superior Special Public Prosecutor may amend, suspend, alter, revoke or confirm decisions made or measures taken by a Special Public Prosecutor subordinate to him.
9. *Transfer of Cases*
Where, in the process of investigation, the Office discovers cases which are outside its jurisdiction, it shall transfer such cases to the regular public prosecutor's office.
10. *Delegation*
1. The Office may, whenever necessary, delegate its powers under Article 6 of this Proclamation to the regular public prosecutor in respect of offences not punishable by rigorous imprisonment.
2. A delegation given under sub-article (1) of this Article shall be decided jointly by the Chief of the Special Public Prosecutors and his Deputies.

፲፩. ልዩ ልዩ ድንጋጌዎች

፩. የልዩ ዓቃቤ ሕግ ሹም አስፈላጊ ሆኖ ካገኘው በወገኛል የተጠረጠረ ወይም ተጠርጥሮ ጉዳዩ በምርመራ ላይ የሚገኝን ሰው ከሦስት ወር ላልበለጠ ጊዜ ከሀገር እንዳይወጣ ወይም ገብረቱ በወገኛል የተገኘ ነው ብሎ ሲያምን እንዲከበር ወይም እንዲታገድ ፍርድ ቤትን ለመጠየቅ ይችላል፡ ፍርድ ቤቱም ተግባራዊነት ውሳኔ ይሰጣል። ይህ እንደተጠበቀ ሆኖ፣ በጣም በአስቸኳይ ለፍርድ ቤት ጥያቄ ለማቅረብ ጊዜ የማይሰጥ ሁኔታ ከገጠመ የልዩ ዓቃቤ ሕግ ሹም በሥልጣኑ ማንኛውንም ሰው በቁጥጥር ሥር የማይወጥ ወይም ገብረት እንዳይገባ ተስ የማስከበር ሥልጣን አለው። ይህ በሚሆንበት ጊዜ ጉዳዩን በተቻለ ፍጥነት ለፍርድ ቤት አቅርቦ ማስወሰን ይኖርበታል።

፪. ይህ አዋጅ ከመጽናቱ በፊት በመደበኛ ፍርድ ቤት ከስ የተመሠረተባቸውና በዚህ አዋጅ በአንቀጽ ፮ ሥር የሚወድቁ የወገኛል ጉዳዮች ለጽሕፈት ቤቱ እንዲቀርቡ የልዩ ዓቃቤያን ሕግ ሹም ካልወሰነ በስተቀር በተጀመሩበት ፍርድ ቤቶች መታየት ይችላሉ።

፲፪. ክሌሎች ሕጉች ጋር ስላለው ቅሪኔ

ከዚህ አዋጅ ጋር የሚቃረን ማንኛውም ሕግ በዚህ አዋጅ በተመለከቱት ጉዳዮች ላይ ተፈጻሚነት አይኖረውም።

፲፫. አዋጁ የሚጸናበት ጊዜ

ይህ አዋጅ በነጋሪት ጋዜጣ ታትሞ ከወጣበት ቀን ጀምሮ የጸና ይሆናል።

አዲስ አበባ ነሐሴ ፪ ቀን ፲፱፻፹፯ ዓ.ም.

መለስ ዜናዊ

የኢትዮጵያ የሽግግር መንግሥት

ፕሬዚዳንት

11. Miscellaneous Provisions.

1. The Chief of the Special Public Prosecutors may, with respect to a person suspected or one whose case is under investigation, apply to a court for an order prohibiting such persons from leaving the Country or requiring the attachment of the property of such person for a period not exceeding three months where it has reasons to believe that such property is the fruit of the crime. The court shall give an appropriate ruling; provided, however, that the Chief of the Special Public Prosecutors shall, without prejudice to the foregoing provision, have the power to detain any person or seize any property in the event of urgency. Such cases shall be brought to the court as soon as possible.

2. Unless the Chief of the Special Public Prosecutors decides otherwise, offences that fall under Article 6 hereof and with respect to which criminal proceedings have been instituted in the ordinary courts before the coming into force of this Proclamation shall continue to be tried in the same courts.

12. Inconsistency with other laws

Any law inconsistent with this Proclamation shall not be applicable to matters covered by this Proclamation.

13. Effective Date

This Proclamation shall enter into force on the date of its publication in the Negerit Gazeta.

Done at Addis Ababa, this 8th day of August 1992

MELES ZENAWI

THE PRESIDENT OF THE TRANSITIONAL
GOVERNMENT OF ETHIOPIA

5. Initial List of Accused in the *Mengistu et al*

1. Colonel Mengistu H/Mariam (*in absentia*)
2. Captain Fikreselassie Wega-Deres
3. Lt. Colonel Fiseha Desta
4. Colonel Teka Tulu (deceased)
5. Colonel Kassahun Tafese
6. Major Birehanu Bayih (*in absentia*)
7. Capt. Legesse Asfaw
8. Colonel Tesfaye G/Kidan (*in absentia*)
9. Major Hadis Tedela (*in absentia*)
10. Colonel Endale Tesema
11. Captain Gesesse Wolde-Kidane
12. Major General Wubshet Desse
13. Colonel Fantaye Yedego

14. Colonel Demise Deresa
15. Major Kasaye Aragaw
16. Lt. Colonel Debela Dinsa
17. Captain Begashaw Atalayi
18. Sergeant Niguse Fanta
19. Lt. Sileshi Mengesha
20. Major Melaku Tefera
21. Lt. Colonel Nadew Zekaraia
22. Sub/Sergeant Petros Gabre
23. Sub/Sergeant Gebrehiwot Gebre-Tsadik
24. Lt. Tadesse Adera (deceased)
25. Sub/Lt. Aragew Yemer
26. Lt. Aklilu Belayeneh
27. Sergeant Alemayehu Ayele
28. Major Giram Ademasu
29. Lt. Abera Aga
30. Major Dejene Wondemeagegnehu
31. Lt. Tegnework Tesfa
32. Lt. Demesew Kasaye
33. Sub/Lt. Getachew Arega
34. Colonel Mekuria Haile
35. Sub/Lt. Kebede Abegaz
36. Sub/Lt. Demesew Abetew
37. Major Tsegaye Tiruneh
38. Sergeant Demeke Banjaw
39. Colonel Abate Meresha
40. Lt. Haile Gebeyehu
41. Sergeant Begashaw Gurmesa
42. Colonel Belay Bitew
43. Colonel Asheber Amare
44. Lt. Getahun Tekele-Mariam
45. Br. General Girma Ayele
46. Sub/Lt. Fisseha Andeto
47. Lt. Tamerat Feyi
48. Sb/Lt. Desalegn Belay
49. Captain Tesema BelayPvt.
50. Eshetu Alemu (*in absentia*)
51. Sergeant Getachew Tekeba (*in absentia*)
52. Sergeant Bekele Degu (*in absentia*)
53. Lt. Haile Melese (*in absentia*)
54. Major Abebe Belayneh (*in absentia*)
55. Captain Yehualashet Girma (*in absentia*)
56. Pvt. Demis Alamirew (*in absentia*)
57. Major Zeleke Beyene (*in absentia*)
58. Sub. Lt. Niguse Wolde

59. Captain Admasu Ayele (*in absentia*)
60. Sergeant Kebede Ali (*in absentia*)
61. Major Asefa Mekonen (*in absentia*)
62. Major Demese Yadete (*in absentia*)
63. Lt. Tiruneh Haileselasie (*in absentia*)
64. Lt. Goshu Alemayehu (*in absentia*)
65. Sub Lt. Manmekito Wondimagegn
66. Sergeant Gizaw W/Michael (*in absentia*)
67. Corporeal Tefera W/Micheal (*in absentia*)
68. Sergeant Niguse Fantaye (*in absentia*)
69. Sub/Sergeant Mamo Ejigu (*in absentia*)
70. Major Ketema Aytenfisu (*in absentia*)
71. Sub Lt. Getahun Aboye
72. Sergeant Kebede Kibret (*in absentia*)
73. Soldier Ambachew Alemu (*in absentia*)
74. Corporeal Mengistu Gemechu
75. Major Hiruy Haileselassie
76. Corporeal Hailu Belay
77. Captain Megos Weld-Mikael
78. Captain Tefera Deneke
79. Lt. Alemayehu Haile
80. Sub. Major Aserat Desta
81. Colonel Atenafu Abate
82. Lt. Ali Musa
83. Siman Tamerat
84. Pv. Mikael Gebre-Niguse
85. Pv Mikael Asegedom
86. Captain Sisay Habte
87. Corporeal Mulugeta Abreha
88. Lt. Bewuketu Kasa
89. Lt. Sileshi Beyen
90. Basha Tefera
91. Corporeal Niguse Negasi
92. Corporeal Niguse ewde
93. Captain Kiros Alemayehu
94. Captian Girma Haile Gebriel
95. Soldier Gezahegn Worku
96. Lt. Gebeyehu Temesegen
97. Major Getachew Shibeshi
98. Corporeal Gebrehiwot Gebre-Tsadekan
99. Corporeal Fekri Zeregabachew
100. Captain Negash Tekletsion
101. Captain Yeman Tesfa
102. Captain Gebre Eyesus Weld-Hana
103. Sergeant Yilma Kebede

104. Corpreal Damtew Germew
 105. Corpreal Girma Burka
 106. Lt. Melese Maru (*in absentia*).

NB The numbering of the accused corresponds to that of the Court's files.

6. Sentences Imposed on Convicts in the *Mengistu et al* by the Trial Court

Number	Accused	Penalty
1	Colonel Mengistu H/Mariam	Rigorous life imprisonment (<i>in absentia</i>)*
2	Captain Fikreselassie Wega-Deres	Rigorous life imprisonment
3	Lt. Colonel Fiseha Desta	Rigorous life imprisonment
5	Colonel Kassahun Tafese	Rigorous life imprisonment
6	Major Birehanu Bayih	Rigorous life imprisonment (<i>in absentia</i>)
7	Captain Legesse Asfaw	Rigorous life imprisonment
8	Colonel Tesfaye G/Kidan	Rigorous life imprisonment (<i>in absentia</i>)
9	Major Hadis Tedela	Rigorous life imprisonment (<i>in absentia</i>)
10	Colonel Endale Tesema	Rigorous life imprisonment
11	Captain Gesesse Wolde-Kidane	Rigorous life imprisonment
12	Major General Wubshet Desse	25 years of rigorous imprisonment
15	Major Kasaye Aragaw	Rigorous life imprisonment
16	Lt. Colonel Debela Dinsa	Rigorous life imprisonment
17	Captain Begashaw Atalayi	Rigorous life imprisonment
19	Lt. Sileshi Mengesha	25 years of rigorous imprisonment
20	Major Melaku Tefera	Rigorous life imprisonment
21	Colonel Nadew Zekarias	Rigorous life imprisonment
22	Sub/Sergeant Petros Gabre	Rigorous life imprisonment
25	Sub/Lt. Aragew Yemer	Rigorous life imprisonment
26	Lt. Aklilu Belayeneh	Rigorous life imprisonment
28	Major Giram Ademasu	Rigorous life imprisonment
29	Lt. Abera Aga	Rigorous life imprisonment
30	Major Dejene Wondemeagegnehu	Rigorous life imprisonment
31	Lt. Tegnework Tesfa	23 years of rigorous imprisonment
32	Lt. Demezew Kasaye	23 years of rigorous imprisonment
34	Colonel Mekuria Haile	Rigorous life imprisonment
35	Sub/Lt. Kebede Abegaz	23 years of rigorous imprisonment
39	Colonel Abate Meresha	Rigorous life imprisonment
40	Lt. Haile Gebeyehu	Rigorous life imprisonment
42	Colonel Belay Bitew	Rigorous life imprisonment
43	Colonel Asheber Amare	Rigorous life imprisonment
47	Lt. Tamerat Feyi	23 years of rigorous imprisonment
48	Sb/Lt. Desalegn Belay	Rigorous life imprisonment

(continued)

(continued)

Number	Accused	Penalty
49	Captain Tesema Belay	Rigorous life imprisonment
50	Pvt. Eshetu Alemu	Rigorous life imprisonment (<i>in absentia</i>)
51	Sergeant Getachew Tekeba	Rigorous life imprisonment (<i>in absentia</i>)
52	Sergeant Bekele Degu	Rigorous life imprisonment (<i>in absentia</i>)
53	Lt. Haile Melese	Rigorous life imprisonment (<i>in absentia</i>)
54	Major Abebe Belayneh	Rigorous life imprisonment (<i>in absentia</i>)
55	Captain Yehuwalashet Girm	Rigorous life imprisonment (<i>in absentia</i>)
56	Pvt. Demis Alamirew	Rigorous life imprisonment (<i>in absentia</i>)
57	Major Zeleke Beyene	Rigorous life imprisonment (<i>in absentia</i>)
58	Sub. Lt. Niguse Wolde	Rigorous life imprisonment
59	Captain Admasu Ayele	Rigorous life imprisonment (<i>in absentia</i>)
60	Sergeant Kebede Ali	Rigorous life imprisonment (<i>in absentia</i>)
61	Major Asefa Mekonen	Rigorous life imprisonment (<i>in absentia</i>)
64	Lt. Goshu Alemayehu	Rigorous life imprisonment (<i>in absentia</i>)
65	Sub Lt. Manmekito Wondimagegn	23 years of rigorous imprisonment (<i>in absentia</i>)
66	Sergeant Gizaw W/Michael	Rigorous life imprisonment (<i>in absentia</i>)
67	Corporeal Tefera W/Micheal	Rigorous life imprisonment (<i>in absentia</i>)
68	Sergeant Niguse Fantaye	Rigorous life imprisonment (<i>in absentia</i>)
70	Major Ketema Aytenfisu	Rigorous life imprisonment (<i>in absentia</i>)
72	Sergeant Kebede Kibret	Rigorous life imprisonment (<i>in absentia</i>)
105	Corporeal Girma Burka	Rigorous life imprisonment
106	Lt. Melese Maru	Rigorous life imprisonment

7. Respondents in the SPP's Appeal against the Sentencing Judgment in the *Mengistu et al*

1. Colonel Mengistu Haile Mariam (*in absentia*)
2. Captain Fikre Selassie Wogaderes
3. Colonel Fisseha Desta
4. Colonel Kasahun Tafese (deceased)
5. Major Berhanu Bayeh (*in absentia*)
6. Captain Legesse Asfaw
7. Colonel Tesfaye Gebrekidan (*in absentia*, the appeal later discontinued cause of respondent's death)
8. Major Addis Tedla (*in absentia*)
9. Lieutenant Colonel Endale Tessema
10. Captain Gessese Wolde-Kidan
11. Major-General Wubshet Dessie
12. Major Kassaye Aragaw
13. Colonel Debela Dinsa
14. Captain Begashaw Atalay

15. Second Lieutenant Sileshi Mengesha
16. Colonel Nadew Zekarias
17. Lieutenant Petros Gebre
18. Second Lieutenant Aragaw Yimer
19. Lieutenant Aklilu Belayneh
20. Major Dejene Wondimagegnehu
21. Lieutenant Desalegn Belay.

8. Appellants against the Conviction and Sentencing Judgment of the FHC in the *Mengistu et al*

1. Colonel Fisseha Desta (Accused Number three, and Respondent Number three)
2. Lt. Aklilu Belayneh (Accused Number 26, and Respondent Number 19)
3. Colonel Kasahun Tafese (deceased, Accused Number Five and Respondent Number Four)
4. Captain Legesse Asfaw (Accused Number 7, and Respondent Number 6)
5. Lieutenant Colonel Endale Tessema (Accused Number 10, and Respondent Number 9)
6. Captain Gessese Wolde-Kidan (Accused Number 11, and Respondent Number 10)
7. Major-General Wubshet Dessie (Accused Number 12, and Respondent Number 11)
8. Colonel Debela Dinsa (Accused Number 16, and Respondent Number 13)
9. Captain Begashaw Atalay (Accused Number 17, and Respondent Number 14)
10. Colonel Nadew Zekarias (Accused Number 21, and Respondent Number 16)
11. Lieutenant Petros Gebre (Accused Number 22, and Respondent Number 17)
12. Major Dejene Wondemagegn (Accused Number 30, and Respondent Number 20)
13. Lt. Desalegn Belay (Accused Number 48, and Respondent Number 21)
14. Captain Girma Ademasu (Accused Number 28)
15. Major Abera Aga (Accused Number 29)
16. Colonel Mekuria Haile (Accused Number 34)
17. Colonel Abat Mersha (Accused Number 39)
18. Lt. Haile Gebeyehu (Accused Number 40)
19. Colonel Belay Bitew (Accused Number 42)
20. Colonel Asheber Amare (Accused Number 43)
21. Second Lt. Nigussie Wolde (Accused Number 58)
22. Lt. Manemeketot Wondemagegn (Accused Number 65)
23. Lt. Girma Bureka (Accused Number 105).

9. Respondents Sentenced to Death by the FSC in the SPP Appeal against the Sentencing Decision of the FHC in *Mengistu et al*

1. Colonel Mengistu Haile Mariam (*in absentia*)
2. Captain Fikre Selassie Wogaderes

3. Colonel Fisseha Desta
4. Major Berhanu Bayeh (*in absentia*)
5. Captain Legesse Asfaw
6. Major Addis Tedla (*in absentia*)
7. Lt. Colonel Endale Tessema
8. Captain Gessese Wolde-Kidan
9. Major-General Wubshet Dessie
10. Major Kassaye Aragaw
11. Colonel Debela Dinsa
12. Captain Begashaw Atalay
13. Lt. Sileshi Mengesha
14. Colonel Nadew Zekarias
15. Lt. Petros Gebre
16. Second Lieutenant Aragaw Yimer
17. Major Dejene Wondimagegnehu
18. Lt. Desalegn Belay.

10. Pardoned Senior *Derg* Officials

1. Captain Fikreselassie Wogderes
2. Captain Legesse Asfaw
3. Major Melaku Tefera Yemer
4. Abdulkadir Mohammed Burka
5. Colonel Tesfaye Woldeclassie (from *Tesfaye Woldeclassie et al case*)
6. General Legesse Belayneh Mersha (from *Tesfaye Woldeclassie et al case*)
7. Gesegese Gebremeskel (From *Gesges et al case*)
8. Lt. Petros Gebre Jofe
9. Lieutenant Seleshi Mengesha
10. Colonel Nadew Zekarias Gezew
11. Captain Begashaw Atalay Melese
12. Major General Wubeshet Dessie
13. Colonel Feseha Desta
14. Colonel Endale Tessema
15. Colonel Debela Dinsa
16. Lt. Argaw Yimer
17. Major Dejene Wondemagegn
18. Eshetu Shenkute
19. Captain Gesese Woldekidan Melesu
20. Lieutenant Desalegn Belay
21. Pvt. Lesanu Molla Merteneh (From *Tesfaye Woldeclassie et al case*)
22. Pvt. Berihun Mamo Alemeneh, and (From *Tesfaye Woldeclassie et al case*)
23. Pvt. Abebe Eshetu Metaferia (From *Tesfaye Woldeclassie et al case*)

11. *Derg* Officials who were Released on Probation in 2011

1. Captain Fikreselassie Wogderes
2. Colonel Feseha Desta
3. Captain Legesse Asfaw
4. Brigader General Legesse Belayneh
5. Lt. Petros Gebre
6. Lt. Seleshi Mengesha
7. Lt. Colonel. Nadew Zekarias
8. Major. General. Wubshet Dessie
9. Colonel. Endale Tessema
10. Major Dejene W/Agegnehu
11. Eshetu Shenkute
12. Lt. Desalegn Belay
13. Pvt. Lesanu Molla
14. Pvt. Abebe Eshetu
15. Pvt. Berihu Mamo
16. Gesge Gebremeskel.

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